



Not ‘undermining’ who? Unpacking the emerging BBNJ regime complex

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ABSTRACT

The ongoing negotiations for a legally binding UNCLOS (United Nations Law of the Sea Convention) Implementing Agreement for the conservation and sustainable use of marine biodiversity beyond national jurisdiction (BBNJ) take place within the framework of a complex landscape of existing International Organizations (IOs) addressing different aspects of ocean governance relevant to the principles and provisions of the new BBNJ Agreement. Addressing the relationship to other instruments, Art. 4 of the current BBNJ draft text indicates that the instrument should not ‘undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies’. This article seeks to clarify which existing ‘legal instruments and frameworks’ have such a contingent relation to the BBNJ Agreement, in which provision of the draft text they may play a role, and to formulate policy recommendations based on the observed complexity. Using ethnographic data collected during three intergovernmental conferences (IGC), we give an overview about involved IOs and their relation to the BBNJ negotiations. Acknowledging the complex interrelations and overlaps between a myriad of IOs and different provisions of the Treaty, we identify the emergence of a BBNJ regime complex. We identify a total of 52 involved IOs of which 10 are mentioned in the latest version of the draft text. We argue that IOs which policymakers perceive as relevant to BBNJ need to be considered in the implementation of the BBNJ agreement and urge negotiators to carefully define relationships with IOs to strengthen cooperation in the implementation of the BBNJ agreement.

1. Introduction

In 2018, governments started negotiating a new legally binding instrument for the conservation and sustainable use of marine Biodiversity Beyond National Jurisdiction (BBNJ) under the United Nations Convention on the Law of the Sea (UNCLOS). So far, five Intergovernmental Conferences (IGCs) have been held at the UN Headquarters in New York (September 2018, March/April 2019, August 2019, March 2022, August 2022), resulting in a draft text for an implementing agreement under UNCLOS that governments are expected to discuss and adopt at a sixth and final IGC 5.2. early 2022. One objective of the new agreement is to establish a coherent legal framework for the conservation and sustainable use of biodiversity in the High Seas [1]. The text includes provisions on Marine Genetic Resources (MGRs), Area-Based Management Tools (ABMTs) including Marine Protected Areas (MPAs), Environmental Impact Assessments (EIAs), and Capacity Building and Transfer of Marine Technology (CBTMT), as well as Cross-cutting issues [2]. Under Cross-cutting issues, states express diverging views concerning the potential institutional set-up for the

implementation of the BBNJ Agreement and in IGC 5, the modalities of a number of potential bodies under the instrument were discussed. However, discussions on the institutional set up remained inconclusive and require ‘additional context and detail’ [3] – to which this paper aims to contribute empirically. We do so by analyzing the role of existing International Organizations (IOs) in the BBNJ negotiation context, which is insofar relevant as the Agreement is expected to complement and cooperate with several other marine biodiversity-related agreements administered by several IOs such as treaty secretariats, inter-governmental organizations, and regional bodies [4].

The need to embed the Agreement within the existing legal framework is reflected in the negotiation process itself as governments attempt to define the relationship between the BBNJ agreement and existing IOs [5]. Each draft version includes a provision on the relationship to other international bodies and states repeatedly emphasize that the instrument should ‘not undermine’ existing bodies. The latest further revised draft text of 30 May 2022 specifies in Article 4.3. that the ‘Agreement shall be interpreted and applied in a manner that [...] does not undermine relevant legal instruments and frameworks and relevant

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global, regional, subregional and sectoral bodies' [6]. Thus, the new BBNJ Agreement is negotiated against the background of an already existing institutional landscape, and observers and state delegates agree that successful negotiation and implementation will require cooperative relationships with other legal instruments [7] to avoid legal inconsistencies and be in line with the imperative to 'not undermine' existing international law.

The relationship between the future BBNJ Agreement and existing IOs has been identified as a stumbling block for the consensual formulation of a new Implementing Agreement [8]. And, while practitioners and scholars are aware of the necessity to place the Agreement in an existing institutional landscape [9] and a considerable body of literature is dedicated to the interplay between the BBNJ agreement and existing legal instruments [10], it is not yet clear, which other international bodies and instruments are meant by the 'not undermining' provision and what role they (may) play. Also, it remains unclear in which exact provisions other IOs are and may become involved although it is recognized that they have greater relevance in particular elements [11]. A systematic empirical investigation unpacking the relationship between IOs and the different provisions of the new instrument has been missing so far [12], leaving much of the discussion on institutional arrangements and 'not undermining' vague and ambiguous.

This article provides an overview of all the involved IOs and the draft provisions in which they may play a role. In this way the paper complements recent literature on BBNJ governance [13] with empirical data on the involved IOs. Showcasing the complexity of IO involvement in the negotiations, this article fills the 'not undermining' provision with a political science perspective and formulates policy recommendations based on insights from regime complexity theory about possible effects of a dense interplay of regimes within an issue-area. Our methodology is designed around the assumption that the BBNJ negotiations represent and shape the marine biodiversity regime complex, i.e. 'an array of partially overlapping and nonhierarchical institutions' [14], which becomes a traceable empirical object. We argue that links between IOs and the new Agreement are formed during the negotiation process and contribute to the formation of regime complexity regardless of the final negotiation outcome. Every IO that states perceive as important could play a role in and reflects a different approach to BBNJ governance which directs our focus to the relationships between states and IOs in the negotiations by analyzing statements made by government and IO delegates.

2. Regime complexity and its effects

IOs and multilateral agreements do not operate in a vacuum but are 'embedded in a larger web of international rules and regimes' [15]. As a result of the multiplication of environmental agreements in recent decades [16], there is an increasing body of literature explaining the emergence of decentralized forms of governance with concepts such as 'treaty congestion' [17], 'clusters of regimes' [18], 'networks of regimes' [19], 'organizational ecology' [20], 'fragmentation' [21], 'polycentricity' [22], or 'regime complex' [23] particularly in the field of global environmental governance [24].

We use the concept 'regime complex', defined as 'an array of partially overlapping and non-hierarchical institutions governing a particular issue-area' [25], not only because state delegates themselves identified that they are 'creating a regime complex' [26] but also because it allows us to analyse the possible effects of different types of relationships between IOs operating in the same issue area during periods of transition to new interests and rules [27]. Guided by the 'regime complex' concept, we identify relationships between IOs as 'overlaps' in 'issue-areas'. In providing empirical evidence of the emerging regime complexity, we build on recent literature that has used the concept 'polycentricity' [28], to describe how an increased multitude of international (and regional) organizations contributes to ocean governance.

Regime complex literature has described negative effects of regime

complexity as in the case of actors engaging in 'forum shopping' [29], when states [30] and non-state actors [31] attempt to take advantage of legal incoherence or inter-institutional competition to select the negotiation forum that favors their interests most [32]. A number of studies show how both states [33] and non-state actors [34] attempt to take advantage of legal inconsistencies and inter-institutional competition [35] undermining the regimes at hand.

Research has also highlighted positive effects emerging from a high density of regimes within one issue-area. They may, for instance, increase overall resource availability [36] or strengthen compliance if institutions' secretariats act in a cross-supportive way and manage to divide labor as a form of lasting co-governance. [37] Scholars have also shown that effective governance depends on the structure of institutional collaboration networks [38] that consider power asymmetries between stakeholders. [39] A regime complex can, if the constituting IOs act cooperatively, positively affect governance as it improves the flow of information [40], the diffusion of practices and management structures [41], and resilience in times of crisis. [42] Recent publications have emphasized that a 'resilient and adaptive structure relies on the involvement of a broad variety of relevant stakeholders' which in the case of the BBNJ Agreement include 'international organizations or instruments working at the global level [...] and/or regional/sectoral level' [43] and how a such an approach can empower 'multiple actors at multiple levels', allowing the participation of various stakeholders including particular local knowledge. [44].

3. Methodology

We collected data through ethnographic fieldwork making use of the rich data collection opportunities offered by the IGCs [45]. During the second, third and fifth two-week IGC sessions at the United Nations' New York Headquarters, we took systematic field notes [46]. Regarding the first and the fourth IGC, which the research team did not attend in-person, we took systematic fieldnotes using the same methodology based on online participation and digital ethnography [47]. This data was supplemented with notes from side events, as well as all draft texts, and participant lists. Using this data, we created a profile of each IO involved in the BBNJ process [48].

We included IOs into our analysis based on the definition of an IO as an organization that contains a) a normative framework (normally codified in a treaty), b) member states (or other IOs as constituting members), and c) a body such as a secretariat with staff, budget, and a registered office embodying the normative framework [49]. This definition enables us to take into account organizations of the UN system that do not possess 'personality' under international law but represent certain normative frameworks and can contribute to govern a certain issue area [50]. This means that our approach recognizes a wide array of actors in the analysis ranging from Convention Secretariats (such as United Nations Division for Oceans and the Law of the Sea (UNDOALOS) and the Convention on Biological Diversity (CBD)) to agencies and programs within the UN system (such as the Food and Agriculture Organization (FAO) and the United Nations Environment Programme (UNEP)) to multilateral funds with secretariats (such as the Global Environmental Facility (GEF) and the Green Climate Fund (GCF)) and other IGOs (such as the International Seabed Authority (ISA) and the World Trade Organization (WTO)), but excludes non-governmental organizations (NGO).

This paper identifies IOs as part of the emerging regime complex when 1) states refer to the IO in relation to provisions of the draft text; 2) IOs themselves made statements or send representatives in the negotiations, and 3) IOs were mentioned in a version of the draft text. For each reference, statement, or draft mention, the relevant provision was traced to determine where exactly these IOs came into contact with the BBNJ process. This approach does not preclude that IOs may become involved in the BBNJ regime complex through other means or that those not present in the negotiation process may not play a role in future BBNJ

governance but it does provide a relatively comprehensive overview of IO involvement at this stage of regime formation.

This means that in our view, IOs become involved in the BBNJ regime complex through state references to IOs. During the BBNJ negotiations states refer to IOs when discussing provisions of the draft text. States 1) propose elements of the IO as a role model for a similar provision in the BBNJ Instrument, 2) try to avoid provisions that might overlap with the IOs mandate, 3) delegate implementation tasks to it, or 4) highlight the scientific or technical knowledge it has produced.

IOs further become involved in the BBNJ when making statements in the ongoing negotiations. By doing so, they aim to shape the constitution of the future regime. IOs use statements to strengthen their role for BBNJ-related governance tasks by 1) mentioning the relevance of their work for BBNJ implementation, 2) expressing interest in hosting new international bodies, 3) clarifying their mandate, and 4) providing information on their ongoing activities [51].

Using the ethnographic data from five IGCs, we describe the involvement of IOs in the BBNJ negotiations as an emerging regime complex structure in which IOs become connected to the BBNJ process.

4. Results: which IOs are part of the emerging BBNJ regime complex?

Our results show that 52 IOs are to some extent involved in different aspects of the new BBNJ Agreement (Table 1), forming a marine biodiversity regime complex. In Table 1 we grouped the IOs into different categories to clarify the scope of their mandate and what kind of IO they are ('Type'). We acknowledge that different types of IOs come with different legal and procedural implications (e.g. IGOs normally possessing a regular Conference of Parties (CoP), or RFMOs having specific target species and geographical limitations) depending on the type. Therefore, we differ between IOs that are part of the UN system, Intergovernmental Organizations (IGOs), Conventions, Regional Fishery Management Organizations (RFMOs), Financial Mechanisms and Scientific Bodies. Further, there is a distinction between IOs that have a legal mandate in areas beyond national jurisdiction (ABNJ) - as the BBNJ instrument will have, and IOs that do not operate in ABNJ because this difference will likely determine the extent of collaboration between that IO and the BBNJ Agreement in the future. This distinction is indicated by the 'scope of mandate' column in Table 1 and allows a more informed analysis of the results in the following section. While these distinctions demonstrate the complexity of IO involvement, we hope that by giving the overview in Table 1, we can inform discussions on the institutional arrangements beyond abstract models of governance [52].

Firstly, we present an overview about all the involved IOs in Table 1, out of which 32 IOs sent representatives to the ongoing negotiations, and 18 IOs organized side events where they inform about their work or their expertise and experiences in relation to BBNJ governance (Table 1). Then we present the 38 IOs that are named by states (Fig. 1), the 15 IOs that made statements in the plenary themselves (Fig. 2) and lastly the 10 IOs that were mentioned in the latest draft text (Fig. 3).

5. How do states 'form' the BBNJ regime complex?

Although states may continue to determine the interaction of the BBNJ regime with other IOs through the CoP, states indicate during the negotiations which IOs are going to play a role in the governance of high seas marine biodiversity in the future through the formulation of the Agreement text. Our data confirms that states are aware of the existing institutional landscape of relevant IOs in which they have to embed the new Agreement. As one state delegate expressed that 'we need to be aware that we are creating a regime complex. This Treaty will not function alone but will speak to other regimes and in relation to others' [53]. Thus, negotiators perceive and recognize the relationship of the new instrument to other bodies and formalize this relationship in text provisions during the negotiations - a process that is empirically

traceable [54].

In total, states referred to 38 IOs in 39 different provisions throughout the five IGCs. The amount of involved IOs, their (potential) overlaps and the involvement of regional as well as global IOs of all different types make the regime interplay in relation to BBNJ governance highly complex. Most IOs are mentioned in relation to 'crosscutting issues' (pink) where states refer to IOs in provisions regarding the institutional arrangements of the agreement. More specifically, they discussed the role of existing IOs in the provisions on the 'clearing-house mechanism', 'scientific and technical body', 'use of terms', 'funding' and the 'secretariat' - hence proposing IOs for implementing tasks and administrative functions. Next to exploring the potential of existing bodies to perform administrative functions for the BBNJ agreement, states also made references to IOs in substantive provisions - such as 'intellectual property rights' or 'benefit-sharing' in the MGR package item; 'identification or areas' and 'international cooperation and coordination' for ABMTs and MPAs; references in relation to the EIA process such as agreeing on thresholds and criteria for EIAs; and references to types and modalities of CBTMT.

In the MGR section, IOs were mentioned to play a role, for example for the sharing of benefits (light-blue) derived from MGRs: a number of states, indicated that either the ISA or the Nagoya Protocol under the CBD or the FAO International Treaty on Plant Genetic Resources could be a model for benefit-sharing provisions. [55] States however also set the limits of the BBNJ mandate by mentioning that the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) already have the authority to deal with intellectual property rights (IPRs) [56]. The conflict over which framework should govern the sharing of benefits from MGRs has been discussed on many occasions [57].

In relation to EIAs, states mentioned the ISA, arguing that it already had the capacity to monitor and publish EIA reports and suggested that the ISA could host the BBNJ secretariat [58]. But also the CBD and UNEP were recognized to play a potential role in the preparation of EIAs as both have developed guidelines for conducting EIAs [59]. In relation to the provision 'public notification and consultation' a number of IOs such as the as the World Meteorological Organization (WMO), the International Atomic Energy Agency (IAEA) and the UN Industrial Development Organization (UNIDO) were mentioned as states wished that these should be consulted in the EIA process.

Many overlaps occurred, when negotiators addressed the role of the clearing-house mechanism (CHM) and the functions that other IOs could play in setting up or hosting such a mechanism. Next to the ISA [60], states mentioned several other bodies such as the (International Oceanographic Commission (IOC), ISA, International Maritime Organization (IMO) and FAO [61] as possible hosts for the CHM. Also, the CBD, which already hosts a biodiversity CHM, was mentioned as a possible model [62].

Furthermore, Fig. 1 indicates that states hold widely different views regarding the IOs that matter in relation to 'the identification of areas' as part of ABMT/MPA package (green). The FAO, IMO and CBD were mentioned in relation to the 'identification of areas' whereas many other IOs were connected to the provisions on 'international cooperation and coordination' for ABMTs/MPAs. In this provision, many of the IOs (North Atlantic Fisheries Organization (NAFO), South-East Atlantic Fisheries Organization (SEAFO), North-East Atlantic Fisheries Commission (NEAFC), Convention on the Conservation of Marine Living Resources (CCAMLR), Commission For The Protection Of The Marine Environment Of The North-East Atlantic (Ospar)) that have a legal mandate in ABNJ (Table 1) are mentioned to emphasize that coordination and cooperation is needed with and among them for the implementation of ABMTs and MPAs in ABNJ.

Some IOs are connected to many different draft provisions throughout all packages which suggests that states identify them as core IOs that play a central role for BBNJ in general. For example, the CBD is linked to 31 different provisions and the ISA to 28. However, the CBD

Table 1

Full list of involved IOs.

Abbreviation	Full Name	Scope of mandate	Type	Total Participants at BBNJ IGCs	Total Mentions in Drafts	Total Statements	Total State References	Total Side Events
AALCO	Asian-African Legal Consultative Organization	Regional (not marine specific)	IGO	2	0	0	0	0
ABIDJAN	The Convention For Cooperation In The Protection, Management And Development Of The Marine And Coastal Environment Of The Atlantic Coast Of The West, Central And Southern Africa Region	National waters + EEZs	Convention	2	0	0	0	1
BARCELONA CONVENTION	Mediterranean Action Plan	National waters + EEZs	Convention	2	0	0	2	0
CBD	Convention On Biological Diversity	National waters + EEZs	Convention	5	10	9	266	4
CCAMLR	Convention For The Conservation Of Antarctic Marine Living Resources	ABNJ	Convention	0	0	0	6	0
CCSBT	commission for the conservation of southern bluefin tuna	ABNJ	RFMO	0	0	0	1	0
CITES	Convention On International Trade In Endangered Species Of Wild Fauna And Flora	ABNJ	Convention	0	1	0	5	0
CMS	Convention On Migratory Species	ABNJ	Convention	2	0	1	0	0
CPPS	Comisión Permanente Del Pacífico Sur	National waters + EEZs	IGO	8	0	0	0	2
FAO	Food And Agriculture Organization Of The United Nations	ABNJ	UN system	21	1	23	36	6
GBIF	Global Biodiversity Information Facility	ABNJ	Scientific Body	0	0	0	1	0
GCF	Green Climate Fund	ABNJ	Financial Mechanism	0	2	0	2	0
GEF	Global Environment Facility	ABNJ	Financial Mechanism	6	3	4	44	1
GESAMP	Joint Group Of Experts On The Scientific Aspects Of Marine Environmental Protection	ABNJ	Scientific Body	0	2	0	1	0
GFCM	General Fisheries Commission For The Mediterranean	National waters + EEZs	RFMO	2	0	0	0	0
HELCOM	Baltic Marine Environment Protection Commission	National waters + EEZs	IGO	1	0	0	1	0
IAEA	International Atomic Energy Agency	global (not marine specific)	IGO	0	0	0	1	0
IATTC	Inter-American Tropical Tuna Commission	ABNJ	RFMO	3	0	0	0	0
ICCAT	International Commission For The Conservation Of Atlantic Tunas	ABNJ	RFMO	2	0	0	0	1
ICES	International Council For The Exploration Of The Sea	ABNJ	IGO	2	0	1	0	1
ICJ	International Court of Justice	global (not marine specific)	UN system	0	0	1	0	3
IMO	International Maritime Organization	global	UN system	11	6	19	44	1
IOC	Intergovernmental Oceanographic Commission Unesco	ABNJ	UN system	29	14	11	114	6
IPBES	Intergovernmental Science-Policy Platform For Biodiversity And Ecosystem Services	No legal mandate	Scientific Body	0	0	0	7	0
IPCC	Intergovernmental Panel On Climate Change	No legal mandate	Scientific Body	0	0	0	7	0
ISA	International Seabed Authority	ABNJ	IGO	23	12	16	119	6
ITLOS	Tribunal For The Law Of The Sea	ABNJ	IGO	0	0	0	32	0
IUCN	International Union For Conservation Of Nature	No legal mandate	IGO	12	0	41	14	4
MINAMATA	Convention On Mercury	global (not marine specific)	Convention	0	1	0	15	0
NAFO	North-West Atlantic Fisheries Organisation	ABNJ	RFMO	4	0	0	1	1
NEAFC	North-East Atlantic Fisheries Commission	ABNJ	RFMO	4	0	5	3	1
NPFC	North Pacific Fisheries Commission	ABNJ	RFMO	3	0	2	0	0
OECD	Organisation For Economic Co-Operation And Development	Not marine specific	IGO	0	0	0	5	0
OSPAR		ABNJ	IGO	4	0	3	15	0

(continued on next page)

Table 1 (continued)

Abbreviation	Full Name	Scope of mandate	Type	Total Participants at BBNJ IGCs	Total Mentions in Drafts	Total Statements	Total State References	Total Side Events
PACIFIC ISLAND FORUM	Ospar Commission For The Protection Of The Marine Environment Of The North-East Atlantic Pacific Island Forum	Regional (not marine specific)	IGO	1	0	0	3	0
SEAFO	South East Atlantic Fisheries Organization	ABNJ	RFMO	3	0	0	2	0
SICA	Central American Integration System	Regional (not marine specific)	IGO	2	0	0	0	0
SPC	Pacific Community	Regional (not marine specific)	IGO	1	0	0	0	1
SPREP	Secretariat Of The Pacific Regional Environment Programme	Regional (not marine specific)	Convention	3	2	0	0	1
UNDESA	United Nations Department Of Economic And Social Affairs	global (not marine specific)	UN system	10	0	0	0	0
UNDOALOS	Division For Ocean Affairs And The Law Of The Sea - Office Of Legal Affairs	Global	Convention	101	4	14	47	2
UNDP	United Nations Development Programme	global (not marine specific)	UN system	0	0	0	1	0
UNECE	Convention On Environmental Impact Assessment In A Transboundary Context	National waters	UN system	0	1	0	0	0
UNEP	United Nations Environment Programme	global (not marine specific)	UN system	29	0	18	9	5
UNFCCC	United Nations Framework Convention On Climate Change	regional (not marine specific)	UN system	3	3	0	19	0
UNFSA	Un Fish Stocks Agreement	ABNJ	UN system	0	0	0	55	0
UNIDO	United Nations Industrial Development Organization	global (not marine specific)	UN system	0	0	0	1	0
WCPFC	Western And Central Pacific Fisheries Commission	ABNJ	RFMO	1	0	0	1	0
WIPO	World Intellectual Property Organization	global (not marine specific)	UN system	3	2	1	43	1
WMO	World Meteorological Organization	No legal mandate	UN system	0	0	0	1	0
WORLD BANK	The World Bank Group	global (not marine specific)	Financial Mechanism	0	0	0	3	0
WTO	World Trade Organization	global (not marine specific)	IGO	0	1	0	24	0

was mentioned in 266 statements and the ISA only in 119 (Table 1), making them the most mentioned IOs in the negotiations. The third most mentioned IO was the IOC with 114 references (Table 1). It was mentioned in relation to 16 different provisions. Next to CBD, IOC and ISA, the most referred to IOs were the IMO, GEF, WIPO and the FAO. Both FAO and IMO were mentioned in many different provisions (13 and 12 respectively) although the overall extent of state references to them was modest (36 and 44 times respectively). The fact that states refer to some IOs (CBD, ISA, IOC, IMO, FAO) in many different provisions, means that states attribute these IOs a core role in the implementation of the BBNJ Agreement but also that they may have widely divergent views which IOs are relevant to specific aspects of the Agreement.

On the other hand, both WIPO and the GEF were mentioned relatively often (43 and 44 times respectively) but occupy a peripheral role in Fig. 1 as the references were made in very few provisions (2 and 3 respectively). States referred to WIPO almost exclusively in relation to the issue of intellectual property rights (IPRs) of MGRs and additional modalities of the transfer of marine technology; and to GEF in relation to funding and capacity building, indicating that states seem to agree on

their role within the BBNJ framework.

6. How do IOs 'form' the BBNJ regime complex?

Not only states determine the governance of BBNJ, but also IOs play a significant role through their multi-faceted engagement in the process. States are also aware that if an implementation task is mandated to an IOs, the IO at hand will have to accept the given mandate [63]. Hence, also IOs play an active role in shaping who will govern the high seas in the future.

During the three IGCs, 15 IOs made statements in the ongoing BBNJ negotiations. They generally do so to be recognized within the future BBNJ agreement in general or the Agreement provision in which they make their statement in particular. Thus, we show in Fig. 2 that IOs are connected to provisions in which they make statements. IOs that relate to a higher number of different provisions are more central and appear larger in Fig. 2.

The graph shows that many IOs tend to make statements on provisions of the Agreement draft text (Fig. 2) in line with the issues in

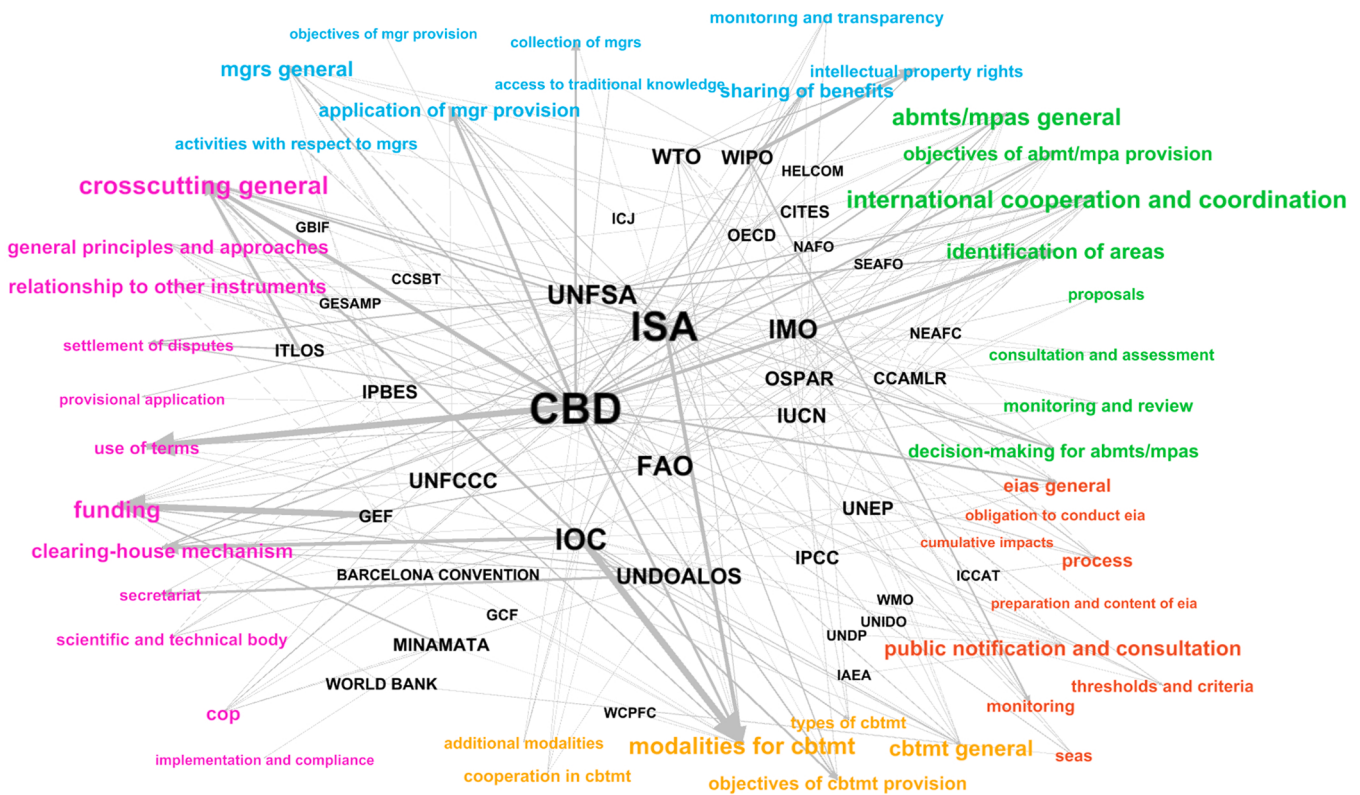


Fig. 1. 38 IOs connected to 39 provisions (and to the five package elements in general). The colors of the provisions are according to the package item: light blue = MGRs; green = ABMT/MPA, red = EIAs, orange = CBTT and pink = crosscutting. The thickness of the lines is the strength of the tie: the number of statements connection an IO to the provision. The size of the IOs represents the number of provisions the IO was related to: if states mentioned it in many different provisions, it appears larger in the graph. When states referred to an IO in general without reference to a specific provision, they are listed in Table 1 but not shown in this graph. (For interpretation of the references to color in this figure legend, the reader is referred to the web version of this article.)

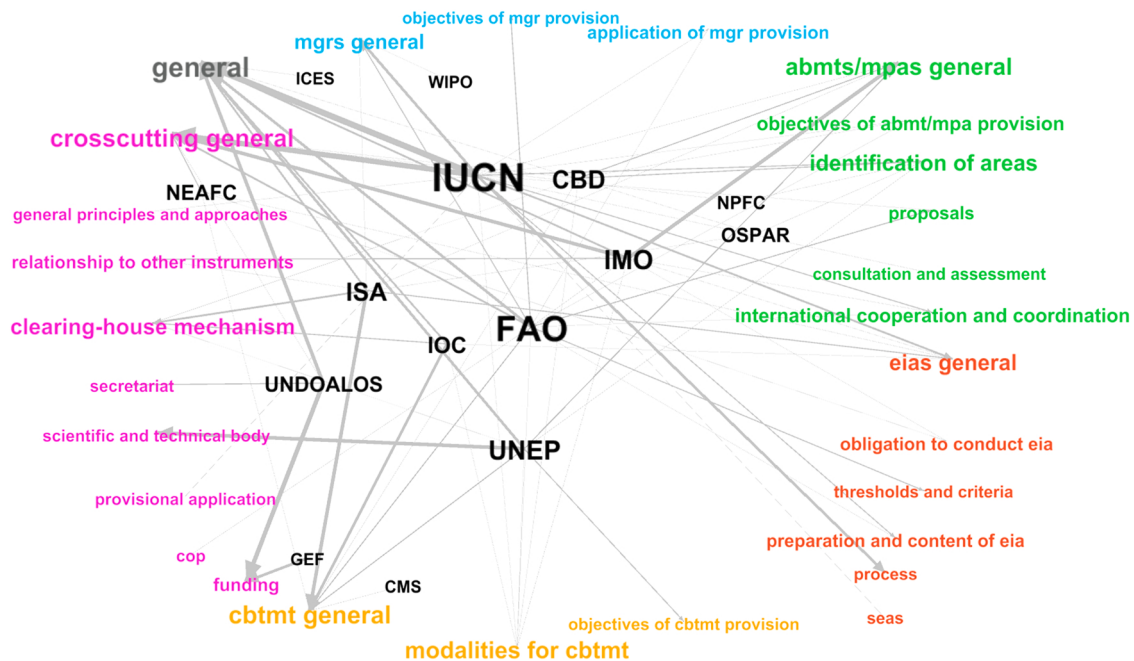


Fig. 2. 15 IOs connected to 20 different provisions (and to the five package elements in general). The colors of the provisions are according to the package item: light blue = MGRs; green = ABMT/MPA, red = EIAs, orange = CBTT and pink = crosscutting. The thickness of the lines is the strength of the tie: the number of statements connection an IO to the provision. IOs that made a general statement without reference to any specific provisions are listed in Table 1 but not displayed in this graph. (For interpretation of the references to color in this figure legend, the reader is referred to the web version of this article.)

which states refer to them (Fig. 1). Many IOs in the BBNJ negotiations occupy a similar position as recognized by state actors (FAO, IMO, ISA, CBD, WIPO, IOC). For other cases (UNEP, International Union for the Conservation of Nature (IUCN)) there is a strong divergence between the activity of the IO and the recognition by states. Both, UNEP and IUCN, issue a high number of statements and have a central position in the IO network (see Fig. 2), but are not very central in the state-reference network (see Fig. 1).

The FAO, for example, has issued most statements pointing out that a new instrument might undermine or duplicate existing frameworks, most notably in relation to fishing related issues and the establishment of ABMTs and MPAs. However, also the IMO and the CBD have issued statements in relation to the ABMT/MPA topic. Both IOs have programs to identify MPAs or ABMTs, which they mention as relevant to the BBNJ Agreement in statements made during negotiations and with regard to the BBNJ objective to establish an overarching and more coherent global and cross-sectoral system of designating and managing MPAs. The CBD has focused largely on the identification of areas for MPAs, promoting their so-called 'EBSA-process' through which they identify ecologically and biologically significant areas. The IMO also already possesses a process to designate Particularly Sensitive Sea Areas (PSSAs) which the IMO representative highlighted in its intervention. Our data suggests that these IOs actively seek a formalized role in the designation and management of high seas MPAs within the framework of the new BBNJ instrument (Fig. 2).

Other IOs also seek to play a role. The ISA for example, highlighted its role in coordinating research vessels [64] or in managing large amounts of scientific data [65]. In statements and side events it showed its capacities to implement some tasks related to the management of marine scientific data and scientific exchange under the future Implementing Agreement. The strong links in Fig. 2 indicate that the ISA is pursuing to host the clearing-house mechanism of the BBNJ instrument. However, the IOC also declared that it was ready to provide member states with technical assistance to develop a proof-of-concept for the clearing-house mechanism [66] and welcomed the reference to the IOC made by several states during IGCs [67].

UNEP issued many statements in relation to the scientific and technical body seeking an active role in its constitution – without other IOs intensively addressing this provision. While UNEP occupies a central role in Fig. 2, due to its issuance of many statements during negotiations, it was not considered a central actor by states (Fig. 1). We understand that UNEP aims to strengthen its position in regard to the governance of high seas biodiversity by referring to UNEP's regional seas programs [68] or its ocean monitoring center [69]. Fig. 2 shows not only that IOs themselves are active in shaping the regime complex but also that they tend to address the same provisions that states connect them to.

This may become particularly clear in the example of the GEF, for which states foresee a very particular role in the implementation of the BBNJ agreement – namely in providing the funding mechanism. Accordingly, the GEF and UNDOALOS were the only IOs that made statements (except for closing statements) in IGC 5 to inform to delegates in detail about the requirements for a funding mechanism and a secretariat for the BBNJ agreement.

7. Which IOs are mentioned in the draft text codifying the regime complex?

Between each round of negotiations, the President of the Conference prepares a draft text codifying the state preferences on specific provisions voiced during the previous conferences. From IGC 2 onwards, the draft text serves as basis for negotiations and structures the discussion on specific provisions. Fig. 3 shows which IOs are mentioned in relation to particular provisions in the latest draft text.

The latest draft text contains references to 8 IOs in crosscutting issues and 2 under MGRs. We can see that some of the core IOs identified in Figs. 1 and 2 that were referred to by states and made statements

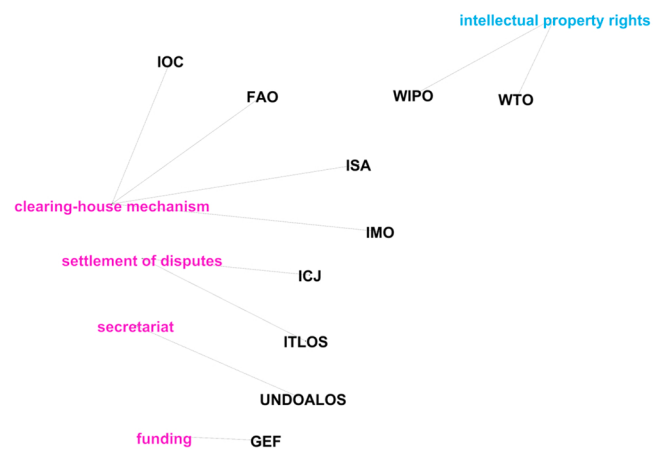


Fig. 3. 10 IOs connected to 5 provisions in the further revised draft text from 30 May 2022.

themselves towards certain elements of the agreement are also mentioned respectively in the draft text. For example, the ISA and IOC are mentioned in relation to the CHM – they were also heavily linked to this item by states and through their own statements. Also, the reference to the GEF in relation to funding and to UNDOALOS as the possible secretariat were taken up from state proposals (Fig. 1).

In other cases, references to specific IOs have been deleted from the text. CBD, Convention on International Trade in Endangered Species (CITES), FAO, IMO, MINAMATA (Convention), the Secretariat of the Pacific Regional Environment Programme (SPREP), World Health Organization (WHO), United Nations Economic Commission for Europe (UNECE), UNEP, United Nations Framework Convention on Climate Change (UNFCCC), all appeared in earlier versions of the draft but are not mentioned in the latest draft. Particularly the CBD has been mentioned by states in regards to many different provisions such as the identification of areas for ABMTs/MPAs, the sharing of benefits from MGRs and modalities of CBT among others. This was taken up into an earlier version of the draft text but deleted in the most recent version. This shows that while the draft Text contains elements of the regime complex proposed by states and IOs, it does not reflect the full extent of the IOs that states and IOs themselves see involved in BBNJ governance.

8. Discussion – mapping the emerging regime complex

This paper aims to inform the BBNJ negotiations by identifying the IOs forming the marine biodiversity regime complex based on empirical data systematically sampled throughout the negotiations. We show that the list of 'potentially relevant' IOs is long (Table 1) and includes 52 different IOs that either directly took part in the BBNJ negotiations by sending participants, making a statement or organizing a side event; or were mentioned by states or by a version of the draft text. The involvement of such a multitude of existing IOs which states and IOs themselves perceive to play a role in many different provisions means that the negotiations of the BBNJ agreement fit the criteria of fragmented or polycentric governance – or as we describe it: are an emerging regime complex [70].

In all the graphs (Figs. 1–3), we identified a group of core IOs including UNDOALOS, ISA and IOC which are mentioned by states, by the latest draft text and were active participants themselves. But we also highlight the continued role of IOs that are not mentioned in the latest draft especially the CBD and UNEP which were mentioned by states or actively took part in the negotiations but were deleted from the draft. Graph 3 shows that 10 IOs are mentioned in the latest draft text, which suggests some form of selection process to take place between the 52 IOs which are mentioned by states or make statements in relation to the BBNJ Agreement themselves and those which currently have a codified

role in the draft text. If we think in regime complex terms this means that states and IOs perceive many overlaps which are however not recognized in the draft text. According to our knowledge of state behavior in regime complexes, it is expected that states create legal inconsistencies to open the opportunity to take advantage of forum-shopping their interests. The existence of overlaps could also lead to competition among IOs especially as we are witnessing a period of transition to new interests and rules characterized by a renewed interest in high seas biodiversity and its genetic properties. If states take advantage of mandate uncertainty and subsequent IO competition in the regime complex through forum-shopping [71] their interests to the IO they prefer, this could delay the implementation or result in the 'toothless' or 'paper tiger' agreement that the delegates of Argentina and South Africa [72] warned of. However, the emergence of a regime complex may also have positive effects, such as an effective division of labor and exchange of data and experiences between existing IOs. In this respect, agreement making in the BBNJ context can tackle the challenge to coordinate the regime complex by becoming the 'overarching arrangement endowed with the authority and capacity to sort out interactions in this dense complex to alleviate tensions or conflicts and to identify opportunities to promote synergy in the activities of the individual elements' [73].

Our insights from regime complexity theory as well as the negotiations indicate that the formulation of the current Article 4.3. on the 'Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies' may become crucial for the future implementation of the BBNJ Agreement. If only the relationship with 10 IOs are explicitly in the text, the 'not undermining' paragraph becomes even more important in defining the evolution of future interactions. Knowing this, how should the 'not undermining' Article 4.3. then be drafted?

9. Conclusion – what does this mean for BBNJ governance?

We showed that the emerging UNCLOS Implementing Agreement on marine biodiversity will be embedded into a regime complex that is likely to affect its implementation but will also be shaped by how the Agreement defines its relationship to other existing instruments. Acknowledging the lengthy list of IOs in Table 1, we formulate two policy recommendations which feed into a specific wording suggestion for the 'not undermining' provision.

Due to the myriad of institutions that may play a role in contrast to the small number of IOs explicitly mentioned in the draft text, we sensitize negotiators to the importance of giving the future BBNJ institutions the room to operate and to establish working relations with other IOs on equal footing so that the Secretariat (through Memorandums of Understanding (MoUs)) and the CoP (through resolutions) can later still continue to build those relationships. IOs that were perceived as relevant are likely to continue to play a role in BBNJ governance even if they are not mentioned in the draft text but not mentioning them leaves the door open to forum-shopping and competition; ultimately weakening compliance and implementation efforts by states. But regime complexity can also have positive effects for treaty implementation. As research has shown that cooperation is more likely to occur when IOs share common goals [74], the BBNJ negotiations could fulfill UNCLOS vision as a 'constitution of the ocean' by providing overarching goals under which IOs cooperate with diverse mandates [75]. Hence, to have a positive impact on BBNJ governance in the future, the BBNJ text should a) set overarching principles and goals for ocean governance without b) creating an artificial legal hierarchy by specifically safeguarding some IOs' mandates.

Based on these principles, we make two specific recommendations for the formulation of Article 4.3. Noting the large number of IOs that may potentially be included in a wide interpretation of 'not undermining' demonstrates the risk that the BBNJ instrument may end up with a very small and fragmented mandate [76]. Hence, it may be useful

to consider a different wording by changing the current order of the elements in the paragraph as proposed by the IUCN [77]. The suggestion is to emphasize the promotion of coherence and coordination with other instruments as cooperation is the preferred way to deal with potential mandate overlaps [78]. The risk that the current formulation of 'not-undermining' may be too wide is particularly present in relation to the exclusion of fish. Observers have warned that if fish is excluded from the scope of BBNJ management in order not to undermine the mandate of FAO or RFMOs, fish may slip 'through the governance net', leaving many species unregulated and unprotected [79].

Secondly, we have shown that states may differ widely in what they consider 'relevant' [80]. In the case of EIAs, for example, letting states select the 'relevant body' in their eyes could lead to 'criteria-dumping'. States could choose the IO to conduct the EIA that offers the lowest or most convenient criteria for their planned activity as there is no agreed definition on which IOs are relevant and which are not. A way around defining which IOs are relevant, may be to avoid this language and leave this to the future BBNJ bodies and their daily interactions with IOs that occur during the implementation – in other words, to give more 'direction, not detail' [81]. The more relationships are defined in the draft text, the less room the BBNJ bodies will have to implement their mandate. Instead, the term 'not undermining' could focus on the effectiveness of their measures [82]. The wording 'does not undermine the effectiveness of their measures' does not preempt IOs per se but formulates a positive relationship between IOs – in support of their measures.

Data availability

The dataset can be found (as described in the data in brief) under this repository: <https://phaidra.univie.ac.at/detail/o:1613830> where it is publicly available for download.

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