



## The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction



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### ABSTRACT

In 2004, the UN General Assembly resolved to establish a working group to consider issues pertaining to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ). The group met nine times between 2006 and 2015 before concluding its mandate by recommending the development of an international legally binding instrument on BBNJ under the United Nations Convention on the Law of the Sea. Based on in-depth interviews with working group participants, this research examines how NGOs contributed to the working group process. Respondents from government delegations highlighted the usefulness of workshops and side events convened by NGOs, and the role of NGOs in bringing experts on technical issues – particularly marine genetic resources and the sharing of benefits – into the BBNJ negotiations. Respondents from both NGOs and government delegations emphasized the importance of fostering personal relationships in order to ensure a steady and constructive information flow. Social media efforts by NGOs were considered by some government representatives to have occasionally hampered open discussion, although they noted that conditions have improved. The lengthy working group process was marked by substantial fluctuation in participation, particularly within government delegations from developing states. Of 1523 individuals who participated in at least one of the working group meetings, only 45 attended more than half of the meetings, and 80% of these were representing NGOs or highly industrialized countries. Respondents felt that this comparatively small number of individuals provided a source of continuity that was crucial for moving the discussions forward.

### 1. Introduction

Non-governmental organizations (NGOs) have become a ubiquitous presence in policy-making and action from the local to the international level on issues as diverse as promoting human rights, banning land mines and fostering nature conservation. The origin of the term itself can be traced back to the formation of the United Nations, and its founding charter, which specifies that “the Economic and Social Council may take suitable arrangements for consultation with non-governmental organizations” [33]. While the definition of what constitutes an NGO differs depending on context and setting, in its most fundamental sense, an NGO must be free of direct government control [37].

Pinpointing when environmental NGOs became significant players within the international community is challenging, but some have

pointed to the run-up to the United Nations Conference on the Human Environment, held in Stockholm, Sweden in 1972 [11,3]. An informal group of NGOs, experts and policy-makers joined together in mid-1971 to draft what became known as the Founex Report on Environment and Development, which subsequently contributed to the framing of the conference and its outcomes, and to this meeting now being considered the first instance of regional cooperation on environmental issues [27,11]. The intervening years have seen a huge growth not only in the number of NGOs participating and having access to international negotiations and policy processes [4,25] but that also have the capacities to contribute to the steering of such political processes [5]. The number of NGOs that have successfully obtained consultative status with the United Nations Economic and Social Council (ECOSOC), for instance, has increased by more than 500% over the past 30 years (from 712 in 1984 to 4045 in 2014) [37].

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NGOs are active in a multitude of policy landscapes, and employ a diverse range of strategies to contribute to international processes, albeit with varying levels of success. For instance, a crucial role has been attributed to NGOs in building political consensus enabling an international ban on the use of land mines [28] and a global framework for forest management and the trading of timber [19], but decades of NGO efforts to reshape the World Bank's approach to development were considered unsuccessful [26]. The multitude of strategies used by NGOs to contribute to international policy processes includes directly participating in international forums and meetings, providing information and expertise, advocating their views through coalitions or direct and indirect lobbying as well as using the media to mobilize public opinion [15,21,32]. All of these strategies have the potential to contribute to the direction and content of international negotiations, and great scholarly interest therefore exists in identifying how and when such strategies are successful [31,8,32]. In recent years, NGOs have been heavily involved in shaping the global development agenda, perhaps most notably in the context of the Sustainable Development Goals (SDGs) [20]. Nevertheless, conceptualizing NGO influence, or drawing one-to-one correlations between NGO actions and negotiation outcomes, remains notoriously difficult [10].

This paper explores perceptions of how NGOs are contributing to the outcomes of the working group mandated by the United Nations General Assembly (UNGA) to look into issues related to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (BBNJ Working Group). After detailing the history and context of the BBNJ negotiations, a two-part methodology is introduced, which draws on a set of semi-structured interviews with individuals who participated in the BBNJ Working Group as representatives of governments or NGOs, and an assessment of participant lists from the nine meetings of the BBNJ Working Group between 2006 and 2015. Only NGOs with consultative status approved by ECOSOC were eligible to independently register their participation in the BBNJ Working Group, so use of the term “NGOs” throughout the remainder of this paper specifically refers to such organizations with at least one representative attending at least one of the BBNJ Working Group meetings.<sup>1</sup>

## 2. Biodiversity beyond areas of national jurisdiction (BBNJ)

### 2.1. Identifying gaps in the legal framework for managing marine areas beyond national jurisdiction

A crucial element within the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 was the formalization of maritime zones for the seabed and water column. Under UNCLOS, the seabed beyond national jurisdiction is known as ‘the Area’. Exclusive economic zones (EEZs) form a 200-nautical mile swath extending from coastlines, within which each respective country has sovereign rights and obligations, including on the management and use of natural resources. Marine areas beyond national jurisdiction (ABNJ) cover nearly half the world's surface. The biodiversity in areas beyond national jurisdiction (BBNJ) remains comparatively unknown, but concerns are growing over the conservation and sustainable use of BBNJ due to a rapidly expanding array of human activities in ABNJ over recent decades [23]. Such activities notably include fishing, shipping, the laying of submarine cables, exploration of mineral resources, and marine scientific research [6]. Moreover, each of these activities is managed and regulated to varying degrees by different sectoral bodies (see Ardron et al. [2] for a comprehensive overview of these organizations and their areas of responsibility).

<sup>1</sup> A list of the 4189 NGOs that have consultative status with the Economic and Social Council (ECOSOC) as of 1 September 2014 can be accessed here: <http://csonet.org/content/documents/E-2014-INF-5%20Issued.pdf> (retrieved 28 December 2016)

Subsequently, a range of legal, institutional and regulatory gaps in the governance of ABNJ, and consequently BBNJ, have been identified, including a lack of overarching governance principles; the absence of a global framework for the establishment or management of marine protected areas in ABNJ; uncertain legal status of marine genetic resources collected in ABNJ; no globally accepted rules on the application of environmental impact assessments and strategic environmental assessments (Wright et al., 2016). Moreover, management of ABNJ has been characterized by a lack of collaboration and cooperation among international, regional and sectoral organizations.

### 2.2. Formation and Mandate of BBNJ Working Group

The complexity of the governance landscape in ABNJ with its high level of sectoralization and fractionalization makes action or changes to the status quo challenging. Consequently, the growing interest in BBNJ led to the issue ultimately being picked up by the United Nations General Assembly (UNGA). Wright et al. [38,39] highlight two factors that have led to the UNGA being deemed the only political arena that could appropriately handle the issue as a whole: firstly, its universality (193 members), and secondly the tendency for issues related to the Law of the Sea being discussed under the UNGA.

In November 2004, with UNGA Resolution 59/24, the “Ad Hoc Open-Ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction” (hereafter, BBNJ Working Group) was established with a four-fold mandate: (1) to survey past and present activities related to BBNJ; (2) to examine the issue from a range of scientific, technical, legal and other perspectives; (3) to identify key issues and questions where further study is needed; (4) to indicate potential options and approaches to move forward with the conservation and sustainable use of BBNJ (UNGA 2004).

### 2.3. Key stages in the BBNJ negotiation process

The BBNJ Working Group met nine times, starting in 2006 and ending in 2015, with the conclusion of its mandate. Overall, the process was characterized by three relatively distinct stages (for more detailed perspectives on the individual meetings, see Morgera [24] and Wright et al. [38,39]).

During the first stage, with BBNJ Working Group meetings held in 2006, 2008 and 2010, the scope and content of the discussions began to take form, and clear divisions between state groups grew apparent. In particular, states diverged almost immediately on the legal status of marine genetic resources (MGRs) collected in ABNJ. One interpretation holds that MGRs collected in the seabed fall under the common heritage of mankind principle that governs the exploitation of seabed mineral resources in UNCLOS Part XI [34], while a second interpretation of the same UNCLOS text holds that MGRs are not defined in UNCLOS and therefore should be handled under the principle of freedom of the high seas [12]. Other delegations raised issues such as the need for a legal framework and institutional mechanism to establish marine protected areas (MPAs) in ABNJ, and pathways to enshrining the precautionary approach in the management and use of BBNJ [38,39].

The second stage of the BBNJ Working Group began with its fourth meeting (2011), during which the negotiations began to grow more clearly defined with key pieces of text. The 2011 meeting was characterized by extensive discussion on the need for a separate multilateral agreement on BBNJ under the auspices of UNCLOS [38,39]. Agreement was reached on a set of four issues, which were subsequently referred to as “the package”, and which were to be the focus of future negotiations on BBNJ. As specified in a letter from the co-chairs of the BBNJ Working Group to the UNGA, the package elements were specified as “marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental

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