

Virtual progress towards a new global treaty on marine biodiversity in areas beyond national jurisdiction

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Matter commented on: Virtual inter-sessional work of the Intergovernmental Conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ).

I. Introduction

Like many other international processes involving travelling and meeting activity, the COVID-19 pandemic has also affected [the process to elaborate an implementing Agreement under the Law of the Sea Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction \(BBNJ\)](#). The process has been the subject of a number of previous blog posts (including [here](#) and [here](#)). A fourth and last scheduled substantive session of the intergovernmental conference (IGC) aimed at negotiating the Agreement was supposed to have taken place in March 2020 in the UN Headquarters, but has been postponed to a date yet to be defined by the UN General Assembly.

The IGC President, Rena Lee, has set out to maintain momentum and take advantage of the waiting time by conducting a digital consultation process during the last months of 2020 on some of the key issues for the Agreement. This post will outline the process and what can be drawn from it so far regarding some of the issues addressed.

II. Virtual BBNJ inter-sessional work from September to December 2020

In September 2020, the IGC President launched [a virtual consultation process](#) for the rest of the year addressing the four thematic clusters set out in the [UNGA mandate for the IGC](#): marine genetic resources (MGRs), including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments (EIA); capacity-building and the transfer of marine technology. Also, cross-cutting issues are included in the digital process.

The process is not fully public but confined to those that are participants in the formal process. These are States Members of the UN, members of the specialised agencies and parties to UNCLOS as well as entities and organisations identified in the [UNGA mandate](#).

Virtual sessions on the various issues have been held consecutively starting with facilitators posting specific issues or topics for discussion in a chat forum. Delegations (including non-state entities and organisations) have then provided written comments and views both individually and in response to comments and views by others. As a result of the extensive participation in the discussions, the facilitators have prolonged some discussion sessions to allow ongoing discussions to be continued. Thereby, capacity building, the transfer of marine technology, and cross-cutting issues, are yet to be addressed by the process. The IGC President has extended the process into 2021 to cover these issues.

This process is by no means the first opportunity for countries and observers to express their views in writing. Throughout the process, they have been regularly invited to provide textual contributions on their views and have done so on a large scale often with lengthy and detailed contributions. Based on these contributions, and the discussions at the third IGC meeting, the IGC President in November 2019 released a [revised draft text](#) of a new treaty that should have formed the basis for negotiations

at the scheduled last IGC meeting in March 2020. The wide range of different opinions on the various issues are reflected in the text with square brackets making it a document of 45 pages. The draft treaty text was followed up by another round of textual submissions which have been [compiled](#) on an article-by-article basis into a 410 pages long document.

Thus, a solid basis already exists on the various positions in the process. However, due to its quantity and level of detail, this material is not easy to grasp. It also reveals that parties remain so far apart on some key issues that time may still not be ripe for differences to be resolved only through plain text negotiations of legal text. Further thematic discussions are still warranted.

The following account of the discussions does not fully cover what has been discussed from September to December 2020 but reflects some key points discussed under the clusters, area-based management tools, EIA, and MGRs.

III. Relationship of the BBNJ Agreement with relevant global and regional legal instruments, frameworks, and bodies

Although this issue was discussed in relation to area-based management tools, it is relevant across the whole Agreement as observed by many participants in the discussion.

As reflected by the questions preceding the discussion, the issue is closely aligned to the condition laid down in the [UNGA mandate for the IGC](#) that the BBNJ Agreement should “not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”. The Introduction of this clause, as a result of a deadlock that had occurred in the process leading up to the mandate, caused by diverging positions on the relationship between a new global instrument and existing global, regional and sectoral instruments and bodies. “Not undermining” was not further defined and the clause has since been extensively discussed both in the negotiation process and by [legal scholars](#).

A plain interpretation of “not undermining” assumes a possible conflict of competences and mandates between a coming BBNJ Agreement and other instruments. A softer understanding emphasises that the Agreement should not undermine the effectiveness of the other relevant instruments and bodies. This understanding does not preclude some degree of overlapping competences while presupposing cooperation, coordination, and coherence between them and the Agreement.

The virtual discussion reveals wide support for a softer understanding. “Not undermining” is for many understood as not weakening but maintaining the ability of the other entities to fulfill their respective mandates. Many participants argue that the BBNJ Agreement should be an opportunity to enhance multilateral cooperation across boundaries and organisations – not a threat. As stated by one participant: *Our aim must be to support and make the best use of the mandates and resources in these bodies for the enhancement of conservation and sustainable use of marine biological diversity. We need to rely on and support all positive forces for management to the fullest if we shall be able to turn the negative spiral and embark on a more sustainable path for the oceans.* Another participant argues that *international cooperation would require a unified and coherent approach to advancing the discussions on the establishment of ABMTs, notwithstanding the various mandates and competences.* Indeed, as many contributors argue, the best way to avoid “undermining” other instruments and bodies is to seek collaboration and coherence with them.

A duty to cooperate is already laid down both in UNCLOS and in the draft text for the BBNJ Agreement, and therefore some participants point out that “not undermining” needs to go in both directions.

It is broadly understood by the participants that “not undermining” also implies that the BBNJ Agreement should avoid unnecessary duplication with other international fora and bodies (IFBs). As stated by one participant: *“We should recognize, in the BBNJ context, the expertise already in place at the regional and sectoral levels and strive to benefit from that expertise rather than competing with it. That said, there is room for improvement across the IFBs spectrum, and the BBNJ Agreement must support efforts to raise the bar.”*

Obviously, the digital discussion on this theme does not in itself resolve the contentious question for the negotiations on how to interpret “not undermining”. However, the “de-dramatisation” of the concept through a positive, collaborative instead of a negative conflict-oriented approach, could well have a positive impact on the formal negotiations.

IV. Environmental Impact Assessment (EIA)

EIA has generally been considered a less controversial issue than the other clusters addressed here, area-based management tools and marine genetic resources. Still, there are many outstanding issues to be resolved also under this cluster. These include thresholds for invoking EIA and whether only activity-based assessments or also program and policy-based Strategic Environmental Assessment (SEA) shall be covered. Another key negotiation theme is the division of responsibilities between individual countries (flag states) responsible for undertaking activities in ABNJ and a coming BBNJ Agreement body on the EIA process and its different components. This issue was the main point of the virtual discussion under this cluster.

A large majority of participants find that the EIA of an activity in ABNJ should be the responsibility of the flag state responsible for the activity. However, it is also widely supported that some aspects of the EIA process could and should be “internationalised”. One participant describes these aspects as *(i) the establishment of common criteria and/or a common process to ensure greater uniformity in States’ implementation and application of the EIA provisions, (ii) the introduction of publication and reporting obligations to increase international transparency and accountability on EIAs, and (iii) the creation of mechanisms for international cooperation on EIAs.*

Several participants consider the introduction of reporting and publication obligations a key element of internationalisation to enhance international transparency and accountability. Besides, also for EIA, mechanisms for international cooperation are seen as a crucial element not least with respect to capacity building.

Many are open to exceptions to the main rule that the State is responsible for EIA conduct, in particular when a State is unable to conduct an EIA process due to capacity constraints.

Some participants note that a complete state-driven process could invite a proponent seeking to undertake an activity affecting ABNJ to shop around for a sponsoring country with the most favourable rules, or in other words seek “flag of convenience EIAs”. It is suggested by some to establish a “call-in” mechanism under the Instrument if the international community is concerned about a state proponent’s decision not to conduct an EIA.

V. Marine genetic resources – modalities for access and benefit-sharing

The exploitation of marine genetic resources is of increasing interest for the pharmaceutical, food, and other industries. Research has revealed that [10 developed countries account for 90% of patents related to marine genetic resources](#). Therefore, developing countries have advocated strongly for the BBNJ Agreement to include a regime for fair and equitable sharing a benefit from the use of genetic resources in ABNJ that corresponds to the regime under the Convention on Biological Diversity (CBD) and its [Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization](#) for genetic resources within national jurisdiction.

Deliberations on this subject in the BBNJ process have so far largely been based on the CBD/Nagoya Protocol transaction-based approach to access and benefit-sharing. However, with no sovereign rights recognised in ABNJ there is not a legally recognised “provider” entitled to prior informed consent and a share of the benefits from genetic resource use under bilateral arrangements as prescribed in the Nagoya Protocol. Instead, the BBNJ Agreement needs to conceive a benefit-sharing system that is not dependent on this transactional approach but still creates incentives for governments and stakeholders to be transparent about the collection and use of genetic resources of ABNJ and to share benefits from their use. Detailed discussions of those challenges can be found in the article, [A tiered approach to the marine genetic resource governance framework under the proposed UNCLOS Agreement for biodiversity beyond national jurisdiction \(BBNJ\)](#).

As has been the case for negotiations under the CBD, the governance of genetic resources is also in these negotiations a prominent and polarising topic between developed and developing countries, the outcome of which may have an impact on the outcome of negotiations on the whole package. A main point of controversy has been the requirement of developing countries that genetic resources in ABNJ shall be considered ‘common heritage of mankind’ like mineral resources of the deep seabed. For exploring and exploiting these resources, UNCLOS provides that they cannot be accessed exclusively by any State, but only for the benefit of humankind under the centralized control and administration of the [International Seabed Authority](#). Developed countries generally oppose this legal status for marine genetic resources but have been somehow reluctant to come up with alternative approaches to benefit-sharing.

Another point of divergence is whether benefits to be shared should include monetary benefits or only non-monetary benefits such as sharing of research data, scientific cooperation, capacity building, and technology transfer.

The virtual discussion on this cluster indicates a narrowing and better understanding of the hitherto opposing views. Thus, the question of common heritage of mankind as the legal status of genetic resources seems to have been downplayed by those that have previously supported it although not completely abandoned.

A broad understanding is expressed that access should rely on a notification rather than a permit system thereby not affecting the freedom under UNCLOS to collect genetic resources in ABNJ. The system should allow for the traceability of MGRs collected and utilised through a Clearing House Mechanism as the central platform for information exchange. The notification system should not only cover MGRs collected in the sea, but also those that are held *ex situ*, such as in gene banks, as well as digital sequence information (DSI) on MGRs (referred to in this process as *ex silico*).

In the case of *in situ* collection, notifications should be required both before and after the expeditions collecting the genetic material acknowledging that benefit-sharing can and should be shared along a spectrum of time and stages throughout the value chain. A pre-cruise notification scheme could create opportunities for participation in research activities and capacity building and the post-cruise schemes will be a way to trigger benefits to be shared on the utilisation of the

collected material. Such utilisation could be in the form of research findings, and possibly - according to a majority of participants - monetary benefits from the successful commercialization of a novel product derived from MGRs.

Other participants argue against any sharing of monetary benefits while a middle position expressed is to take stock of the development in terms of the use of marine genetic resources from ABNJ and revisit the issue if evidence shows that the situation regarding value creation from MGRs in ABNJ has changed.

However, generally, there seems to be less attention than previously in the BBNJ process to commercial reward and monetary benefits. Aware that most of the research done with MGRs does not necessarily lead to commercialization, many contributors stress the need for fair and equitable sharing of the non-monetary benefits. The importance of genetic research is highlighted for addressing not only conservation and sustainable use of biodiversity, but also poverty, hunger, and job creation all relevant for meeting the Sustainable Development Goals. The BBNJ Agreement is widely seen as an instrument to promote research on MGRs in ABNJ for the benefit of all as well as to enable equitable access to genomic tools and technologies and capacities by putting into place the necessary institutional mechanisms.

All in all, the digital deliberations under this cluster have moved discussions on modalities for access and benefit-sharing away from a CBD framed transaction approach and towards a multilateral benefit-sharing system based on activities of collection, research, and development that may better suit the unique nature of MGRs of ABNJ. This focus on activity rather than physical sample may also be better suited to encompass benefit-sharing in relation to the increasing intangible aspects of genetic resources such as DSI which has proved to be [a big challenge under the CBD approach](#).

VI. Concluding remarks

This still ongoing virtual consultation process on key elements in the BBNJ negotiation process has proved to be a successful and well-used waiting time leading up to the resumption of formal negotiations. The process is a useful innovation between the well-established submissions of detailed positions and negotiation of concrete legal text. The chat-like setting has provided an opportunity to explain and discuss the selected issues in a straightforward and informal manner. The format applied with a facilitator posing concrete questions for discussion has worked well to break down difficult issues to relatively short interventions and explanations mostly without resorting to legal language.

This type of communication seems well-suited for gaining a better understanding of the opponent's views. Moreover, reading through the contributions leaves an impression of gaps between country positions being narrowed. Whether this is actually the case remains to be seen when formal negotiations are resumed at an ever-unknown time.

One shortcoming of the digital process has been that real ping pong-like discussions have mainly been between parties with largely converging and less between those with diverging views. Another shortcoming is that countries with the most critical and minimalistic approaches to the BBNJ Agreement have not participated or only participated to a limited extent. On the positive note, regional groups and the developing country Group of 77 and China have participated extensively in the process.

Thus, there are good reasons to continue the digital process. Besides addressing the remaining clusters, capacity-building and the transfer of marine technology and cross-cutting issues, there are

many more issues under the already addressed clusters that could benefit from being discussed in this manner.

Besides, this type of consultation and discussion should inspire other multilateral fora to prevent from holding formal, physical meetings due to the pandemic. This includes not least the thematic sister forum, the Convention on Biological Diversity for whom its COP 15 scheduled for October 2020 and several of preparatory meetings have been postponed. Before the COVID-19 outbreak, a comprehensive and participatory consultation process was initiated for the preparation of a [post-2020 global biodiversity framework](#) with goals and targets to be adopted at COP 15. This process is now in a deadlock which a BBNJ-like online process would be suitable for breaking.

Could formal negotiations of the BBNJ Agreement also take place virtually if the pandemic continues to block international physical meetings? Even if in November 2020, an unprecedented virtual [meeting of the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer](#) was held with the adoption of multiple legally binding decisions, the answer will be in the negative. Despite a successful virtual preparatory process, the remaining negotiations will still be very demanding and cover many different outstanding issues. Here, the physical aspects of a negotiation situation such as body language, interpersonal bonding, and the general mood of the room will be indispensable for the negotiations to lead to a BBNJ Agreement.