

Operationalizing the Ecosystem Approach in the BBNJ Treaty

By: Vito De Lucia

Matter commented on: 5th Session of the Intergovernmental Conference towards a new treaty on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, Further Refreshed Draft Text, A/CONF.232/2022/CRP.13/Add.1

1 Introduction: IGC5 and the “Further Refreshed Draft Text”

After the long COVID hiatus and the [digital intersessional discussions](#), the BBNJ negotiations restarted in earnest in 2022 with two sessions of the intergovernmental conference (IGC): the fourth and last of the sessions stipulated in the UNGA resolution ([A/RES/72/249](#)) that launched the IGC was held in March 2022; and an additional fifth session, inevitable given the state of the negotiations at the end of IGC4 was held in August 2022 (IGC5). While IGC5 was not conclusive, much progress was made on many of the key issues, and a series of revisions of the negotiating text were produced by the Presidency during IGC5 (so called “refreshed” texts), in order to streamline the negotiations. At the end of an intense negotiating session, and amidst renewed commitments to finalize the BBNJ treaty, IGC5 was suspended without a consensus on a text, but with the view of resuming the same fifth session as soon as possible in 2023 (rather than providing for a sixth session of the IGC). This clearly gives the sense of optimism about concluding the negotiations at the resumed session of IGC5, despite disappointment of the parts of many delegations, which gave rise to emotional closing statements, especially on the part of Pacific and Small Island State delegations, for the missed opportunity to close the deal in August, as reported by the [Earth Negotiations Bulletin](#) (ENB, p. 10). However, this new pause gives room for some last-minute reflections.

In this blog post, I shall take the opportunity to articulate some concrete suggestions for a meaningful integration of the ecosystem approach (EA) in the BBNJ treaty, by linking its role as one of the overarching principles with the role that strategic environmental assessments (SEAs) may play in its operationalization. The analysis proceeds on the basis of the provisions and formulations contained in the latest draft circulated during IGC5, the further refreshed draft text (A/CONF.232/2022/CRP.13/Add.1). It is important to note, however, that the further refreshed draft text does not necessarily represent consensus, as adamantly expressed by China ([ENB, p.9](#)) at IGC5, which stressed that “in the drafting of this document, all views should have been treated equally and the document should have reflected all issues” ([ENB, p.9](#)), emphasizing at the same time how the BBNJ negotiations is a state-led process. It is also unclear at this point whether this further refreshed draft text will be the basis for further negotiations at the resumed session of IGC5.

2 The Ecosystem Approach and Strategic Environmental Assessment

The EA is an increasingly central concept for addressing the conservation and sustainable use of biological diversity. Endorsed in the mid-1990s as the primary framework of action by the Convention of Biological Diversity, it has subsequently gained traction in a variety of fields and contexts, including ocean governance and fisheries management, thanks to its promise to

overcome the traditionally fragmented management paradigm, by instead shifting focus to a holistic ecosystem governance model. Not surprisingly then, the EA is one of the suggested general principles and approaches envisioned as a normative framing for the entire BBNJ treaty (art. 5€, further refreshed draft text). However, its inclusion has remained, to a large extent, a mere mention in a non-operative part of the draft BBNJ treaty. It is conceivable that, should this draft be adopted, the role of EA would remain negligible. To complicate matters, and to further diminish the concrete value of its inclusion, there exist a [multiplicity of understandings of the concept](#), and of its operational and normative implications. And while it is true that [some of its elements have been to an extent included in various parts of the BBNJ draft text already from early on](#), there is one more concrete opportunity to really delineate a mechanism to effectively operationalize EA in the BBNJ treaty. One such opportunity to address this problem is to articulate a concrete link between the general and generic normative framing intended with its inclusion among general principles and approaches, and one of the operative parts of the treaty text, namely Part IV on environmental impact assessments (EIAs), and more specifically the provisions on strategic environmental assessments (SEAs). SEAs have been an important element in the discussions within the context of the topic of EIAs [since early in the BBNJ process](#). Now that the negotiations seem to come close to a successful outcome (successful at least in the restricted sense of adopting a treaty, if not in the other, more complex, sense of adopting a *successful* treaty), and as the draft text begins to settle in many, if not all, respects, we can see with more clarity how SEAs are being imagined and integrated in the future BBNJ treaty text.

However, art. 41ter of the further refreshed draft text is vague and of little practical value in its current form, which merely sets out generic obligations to carry out SEAs on the part of States parties (paragraph 1) or alternative the Conference of the Parties (paragraph 2). SEA should by contrast be a crucial mechanism in the BBNJ treaty as it is the key to ensure a comprehensive ecosystem-based conservation approach to BBNJ, rather than a piecemeal approach based on isolated considerations of individual projects and activities. In this sense, and importantly, SEAs should be explicitly articulated as an integral element for the operationalization of EA, which, as already mentioned, is to date merely included as one of the general principles of the BBNJ treaty. A direct link could be established in a revised version of art. 41ter, precisely to both ground EA in the text, and to ensure its effective implementation. It is also suggested that a direct link be established between art. 15 and art. 41ter, given the inevitable central role of cumulative effects and impacts, especially for SEAs. However, this is not sufficient. It is thus further suggested that art. 41bis, which enumerates the tasks of the Scientific and Technical Body (STB) be also more fully developed as to the role of the STB in relation to SEAs. In this respect, current letter (h), which today reads “The conduct of strategic environmental assessments” could be replaced with the following:

(h) The conduct of strategic environmental assessments, including the preparation of a map of large marine ecosystems to form the basis for such strategic environmental assessments. In this respect, the Scientific and Technical Body, shall develop, in cooperation with relevant global and regional scientific advice bodies and institutions and in cooperation with relevant expert societies and scientific and academic bodies and institutions, a map of large marine ecosystems that shall form the geographical and ecological basis for developing regional strategic environmental assessments. In the preparation of such map, the

Scientific and Technical body shall also consider relevant local, traditional and indigenous knowledge.

This textual proposal would also chime with the current formulation of art. 41ter paragraphs 2 and 4, which carve out a role for the Conference of the Parties in relation to the conduct of SEAs and, relatedly, in relation to the preparation of guidance on the conduct of such assessments. The reason for this proposed textual amendment is that, considering how SEAs are crucial tools for the effective implementation of the EA, there should be a concrete anchoring in relation to the *spatial* coordinates within which the EA should be implemented. Large Marine Ecosystems (LMEs) represent the current frontier of the EA in an oceanic context, as for example proposed by the Arctic Council in its [guidelines for the implementation of EA](#). It stands thus to reason to introduce LMEs as the necessary spatial basis for implementing in an effective manner EA through SEAs, since, as recognized by the Arctic Council, the spatial delineation of ecosystems is “fundamental to implementing EA because of the necessity of knowing the geographic scope over which the negative consequences of human activities are to be identified, assessed, and addressed” ([Arctic Council, p. 1](#)). And because such spatial scope both exceeds the jurisdictional scope of individual coastal states, and may also include areas that are both within and beyond national jurisdiction, it is paramount that LMEs be integrated in the work of BBNJ bodies that, precisely for their global outlook, may ensure the right coordination and ensure compatibility through an effective implementation of EA through comprehensive and ecosystem-based SEAs.

3 Conclusions

The BBNJ negotiations seems to be approaching their conclusion, and it is expected that the resumed fifth session of the negotiations, to be held early in 2023, should deliver a final text that delegations will be willing to accept and adopt. One important principle in relation to the protection and preservation of the marine environment is the EA. However, its current inclusion in the draft BBNJ treaty amounts to a mere textual mention among other general principles and approaches. I suggest that specifying in a more explicit manner the linkage between SEAs and the EA will help concretize the role of the EA in the future BBNJ treaty. This would be very important, since otherwise, given the complexities and uncertainties involved in its articulation and operationalization, it will be arguably difficult to turn the EA into an operational principle, as I have already argued [elsewhere](#). Additionally, the role of SEAs would be equally strengthened and linked more explicitly with the EA. The suggested textual formulations arguably offer a concrete model for how to achieve an effective operationalization of EA, through the tool of LMEs, which is a recognized necessary starting point for the EA in order to give it geographically and ecologically meaningful boundaries.

This post may be cited as: Vito De Lucia, “Operationalizing the Ecosystem Approach in the BBNJ Treaty” (October 17th, 2022), on-line: https://site.uit.no/nclos/wp-content/uploads/sites/179/2022/10/Vito-de-Lucia_181022_NCLOS-Blog.pdf

To subscribe to The NCLOS Blog by email, please go to <http://site.uit.no/nclos/>