

## Negotiating Biodiversity Conservation in the High Seas: An ecosystem approach

Vito De Lucia

The inclusion of Sustainable Development Goal (SDG) 14 “Life below water” in the UN 2030 Agenda emphasises the significance of the conservation of the oceans’ biodiversity for our common future. And indeed, the oceans are crucial for life on the planet. Yet their ecosystems and biodiversity are under extreme pressure from climate change, overharvesting, plastic pollution etc.

The United Nations Convention on the Law of the Sea (UNCLOS) sets a comprehensive framework for regulating all activities at sea. The regulation of the high seas, however, remains fragmented, as it is comprised of several instruments addressing specific regions or sectors (shipping, fisheries, pollution etc.), but important gaps remain. There is, for example, no global legal basis for establishing marine protected areas or for regulating emerging activities such as bioprospecting (collecting marine genetic material with a view to commercial development). Yet the high seas cover 50% of the Earth’s surface and contain an incredibly rich but vulnerable biodiversity. These gaps in the regulatory framework for the conservation of biodiversity in the high seas endanger their resilience and health.

The recognition of these gaps prompted the UN General Assembly to start a process towards the adoption of a new agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ), which, after almost two decades, is reaching a crucial point. Of the four formal sessions of the intergovernmental conference scheduled by the UN General Assembly in 2017,

only one remains. COVID-19 has, however, halted the process, and the last session has been postponed to a date yet to be defined. This gives pause to reflect on the key aspects of the negotiations. This article will highlight some of the most problematic areas of the negotiations and offer some policy recommendations to move the process forward. Ultimately, it argues that these negotiations offer an opportunity to take an ecosystem approach to the conservation of marine biodiversity.

### The BBNJ negotiations in brief

The urgent need to develop norms and mechanisms aimed at protecting vulnerable marine ecosystems, especially in areas beyond national jurisdiction, was recognised at the 2003 meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UN Doc. A/58/95, para 98ff.). A year later, the UN General Assembly established an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ WG).

The BBNJ WG recommended in 2011 that a “process be initiated” towards the development of an agreement under UNCLOS on marine biodiversity in areas beyond national jurisdiction. In its report, the working group identified four substantive areas to address urgently and as a single package: 1) marine genetic resources (MGRs), including questions on

the sharing of benefits; 2) measures such as area-based management tools, including marine protected areas; 3) environmental impact assessments; and 4) capacity-building and the transfer of marine technology (UN Doc. A/66/119, Annex, para 1(b)).

The BBNJ WG submitted its final report in 2015, and on that basis, the UN General Assembly launched a preparatory committee (PREPCOM) to “make substantive recommendations” on elements of a legally binding instrument (UN Doc. A/69/780, para 1(e)). On the basis of the recommendations made in the PREPCOM report (A/AC.287/2017/PC.4/, Section III), the General Assembly launched a formal intergovernmental conference (IGC) on 24 December 2017 (A/RES/72/249). To date, the IGC has held three of the four substantive sessions scheduled in the resolution. The fourth and last session, scheduled for March/April 2020, has been postponed due to the COVID-19 pandemic to a date yet to be defined. However, it was already evident during the third IGC that there would be a need for additional negotiating sessions, given the divergence of views on several key topics.

## Key challenges

The BBNJ agreement should address, as mentioned, four different topics. However, the package reflects the interests of the different states rather than any internal coherence. While the European Union, for example, has been a long-standing champion of marine protected areas, many developing states are particularly interested in developing a legal regime for the utilisation of MGRs, and for the equitable sharing of any benefits that may derive from them. Additionally, throughout the process, several states have been rather hostile towards the idea of a new global agreement, as they consider that there is enough regulatory and institutional capacity already in place. Furthermore, they fear that a new global agreement may undermine existing sectoral or regional instruments and bodies which, in their view, function sufficiently well. These different interests pose a set of challenges for the negotiations.

### 1. Marine genetic resources as a common heritage of mankind

The topic of MGRs is arguably the most contentious. As the negotiations must address the four topics together and as a whole – which means that nothing is agreed until everything is agreed – the topic of MGRs in many ways holds the key for the entire agreement. There are several issues that are still far from being resolved, but two stand out as paramount: the legal status of MGRs and the related questions of the type of benefits, and the scope of the definition of MGRs. As regards the first issue, the key point of contention is whether MGRs are, or should be, considered as

the common heritage of mankind. This question has been debated since the very beginning of the BBNJ process and remains perhaps the most critical issue at stake.

There are four different views on the matter:

1. Developing countries in particular take the view that unregulated access and exclusive exploitation of MGRs by a few countries is unfair and that MGRs are already encompassed by the principle of the common heritage of mankind as enshrined in UNCLOS.
2. Developing countries also hold that, regardless of whether MGRs fall under the principle of the common heritage of mankind pursuant to UNCLOS, they should be considered common heritage of mankind for the purposes of the BBNJ agreement.
3. A third view is that MGRs are encompassed by the regime of freedom of the high seas. Developed countries hold this position on the basis that the principle of the common heritage of mankind is only applicable to mineral resources of the area, and not to living resources such as MGRs. They consider that opening a discussion on common heritage and its applicability to MGRs would amount to a renegotiation of UNCLOS. Additionally, bioprospecting is understood by most developed countries to fall within the meaning of marine scientific research, and thus subject to a regime of freedom.
4. Some countries, finally, argue that this principled question should be set aside, and the focus should instead be on reaching agreement on the practical aspects of the benefit sharing regime.

However, it is hard to imagine that developing countries would agree to setting aside the question of the common heritage of mankind, given the reactions during IGC-3 to the deletion of any reference to common heritage in the draft text prepared ahead of the session by the President of the IGC. Indeed, the African Group complained that a BBNJ agreement without the principle of common heritage would lack a soul and would be like a vessel navigating without a compass. The G77, too, insisted that the principle of common heritage is central to the entire BBNJ agreement, that MGRs are a common heritage of mankind, that benefits should be mandatory and monetary (a view opposed by developed countries, which tend to envision voluntary and non-monetary benefits), and that the sharing of benefits should be governed by an international regime.

The question of the common heritage of mankind has deep roots in the history of the law of the sea, and it has remained a contested concept throughout. In the context of the BBNJ negotiations, this history comes back to life and is reflected in the positions of the

different delegations which reproduce the same positions held during the negotiations of UNCLOS in the 1970s. It is not easy to imagine that a compromise will be easily reached.

A second key question regards the scope of the definition of MGRs. MGRs are usually accessed in one of three ways: in situ, i.e. in their natural habitat; ex situ, i.e. in gene banks or collections; and in their digitalised form (also referred to as in silico access). While developed states argue that the BBNJ agreement should only regulate in situ (and possibly ex situ) MGRs, developing states argue by contrast that digitalised genetic information should also fall within the scope of the agreement, in order to reflect the realities of the biotechnology industry, and ensure the meaningful applicability of the benefit sharing regime.

## 2. Global vs. regional approach

A second key challenge relates to the relationship between the future BBNJ agreement and relevant global, sectoral and regional instruments. Throughout the negotiations, there have been two main ways to think about this question. Some delegations support a “global approach”, in the sense that the BBNJ agreement should establish a global framework and global institutions with a strong mandate and with direct competence to adopt measures for the conservation of marine biodiversity. Developing countries have usually supported this global approach, in full or in part. By contrast, countries such as Norway, Iceland, Russia, the Republic of Korea, Japan, China and the United States (countries with strong fisheries interests and strong institutions in their regions) have historically favoured a regional approach. A third, middle-of-the-road approach was proposed by New Zealand during the PREPCOM phase. Known as the hybrid approach, it immediately gained traction and still gathers much support, but the details of how this hybridity should be articulated are still being negotiated. While the hybrid approach offers a possible way to bridge the differences between the global and regional approaches, the distance between the two negotiating preferences remains significant, as is evident in the current revised draft text prepared by the President of the IGC (UN Doc. A/CONF.232/2020/3).

Countries supporting a regional approach want to ensure that the BBNJ treaty does not undermine regional and sectoral instruments that already operate and are competent to adopt measures within their respective mandates. The term “undermine” is very ambiguous, however, and its implications contested. The notion originated during the BBNJ WG phase as a safeguard to protect the fisheries management framework from possible encroachment of a new BBNJ agreement, and more broadly to avoid infringing “on the regulatory scope of existing agreements or duplicating ongoing efforts” (UN Doc. A/67/95,

2012, para 29). The notion of “not undermining”, however, risks creating what has been called a status quo bias, by delimiting to such an extent the applicability of the BBNJ agreement as to render it of marginal significance.

While there are also other challenges in relation to other topics, these are challenges that so far have proven most difficult to overcome. Their resolution is crucial for the successful adoption of a BBNJ agreement.

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## Policy recommendations

The pause in the negotiations caused by the COVID-19 pandemic has created a window of opportunity for reflecting on how to move forward. With respect to the question of the common heritage of mankind, one way out of the impasse may be to articulate a benefit sharing regime that reflects the key elements of the common heritage regime – non-appropriation, peaceful uses, equitable sharing of benefits (three points which were included in the draft text prepared ahead of IGC-3) and international management. In addition, the principle of common heritage could be mentioned in the preamble, in order to broadly frame the agreement. Accepting a thus reduced, albeit still framing role for the principle of common heritage could be exchanged against concrete wins on the details of the benefit sharing regime (for example in relation to the type of monetary benefits, or on the legal nature of the obligation to share benefits). Furthermore, the common interests with respect to the conservation of marine biodiversity in areas beyond national jurisdiction could be safeguarded by reproducing the phrasing of the Convention on Biological Diversity, whose preamble states that the conservation of biodiversity is a common concern of humankind.

With respect to the relationship between the BBNJ agreement and other instruments, it is evident to many delegations, as well as to observers, that the effective governance of marine areas beyond national jurisdiction requires considerable involvement of regional instruments and bodies, albeit within an overarching framework that should provide a “common goal or purpose” (Gjerde et al. 2018), as well as principles that are common to the relevant bodies. The key question, then, is how to balance the need for regional implementation and safeguarding of common global standards, also in light of the significantly different institutional and resource capacities across regions.

However, it is important to note how the discussion on the relationship between the BBNJ agreement and relevant instruments and bodies operating across a range of geographical and thematic areas (e.g. shipping, fisheries, mineral extraction etc.) offers a real

opportunity for rethinking the boundaries of governance through a logic of ecosystems. This opportunity is contingent on shifting the focus from not undermining the mandates of sectoral and regional instruments to ensuring complementarity, coordination and compatibility among their mandates – in ways that resonate with the approach of the 2030 Agenda. Similarly, the measures adopted by each relevant body need to be in line with the goals of the BBNJ agreement and, in turn, with the overall objectives of UNCLOS. This also means moving away from the binary global/regional and instead thinking in terms of ecosystems.

It may be useful to take a closer look at the Collective Arrangement by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the North East Atlantic Fisheries Commission (NEAFC) for the governance of the North East Atlantic. This framework aims to integrate the regional, sectoral and global dimensions in a coherent arrangement for decision-making in order to “help deliver” ecosystem-based governance of the oceans. This could be a model for the implementation of the BBNJ agreement through regional and sectoral instruments and bodies that takes advantage of existing mandates and regulatory competence, as well as of institutional and operational capacity, while ensuring common global standards. The usefulness of such a model is confirmed by a recent proposal by Iceland that envisions a regional “consultation process” involving all relevant instruments for a given region, including relevant sectoral intergovernmental organisations such as the International Maritime Organization and the International Seabed Authority. The proposal also indicates that the consultation process should be “formalised” in one of two ways: through the constitution of a formal international body, or more loosely through one of the participat-

ing bodies taking up the role of an administrative coordinator. While Iceland has been a consistently strong supporter of a regional approach, this model, which is in many ways similar to the Collective Arrangement, offers the possibility of creating a bridge, insofar as the common global standards are to be the framing normative guidance for the measures to be adopted regionally

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#### Further reading

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#### Imprint

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