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# MARIPOLDATA Ocean Seminar

## The Legal Status of Marine Genetic Resources in BBNJ

27<sup>th</sup> January, 2021

**Guest Speaker:** Konrad Marciniak, PhD, law, Director of the Legal and Treaty Department, Ministry of Foreign Affairs of the Republic of Poland

Konrad Marciniak holds a Ph.D in law on the topic 'Marine Genetic Resources in the Law of the Sea' and is currently Director at the Legal and Treaty Department of the Ministry of Foreign Affairs of the Republic of Poland. He advises the Government of Poland in particular on the law of treaties, issues related to the law of the sea and environmental law. Besides representing the Government of Poland in the work of the European Union Working Party on the Law of the Sea (COMAR), and at the annual Antarctic Treaty Consultative Meetings (ATCM), he also participates in the ongoing negotiations on marine biological diversity in areas beyond national jurisdiction. He authored a number of articles on the law of the sea and other public international law and EU law topics. His current research interests relate to public international law, including in particular the law of the sea, biodiversity and environmental law, climate change and law of treaties.

### Reading Material for the Session:

Marciniak, K. J. (2020). "Chapter 3 The Legal Status of Marine Genetic Resources in the Context of BBNJ Negotiations: Diverse Legal Regimes and Related Problems". In *New Knowledge and Changing Circumstances in the Law of the Sea*. Leiden, The Netherlands: Brill | Nijhoff. doi: [https://doi.org/10.1163/9789004437753\\_005](https://doi.org/10.1163/9789004437753_005)

Vierros, M., Suttle, C.A., Harden-Davies, H. and Burton, G. (2016), Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources. *Limnology and Oceanography Bulletin*, 25: 29-35.  
<https://doi.org/10.1002/lob.10108>

The monthly **MARIPOLDATA Ocean Seminar Series** offer a virtual space to get information and engage in exchanges on ocean governance issues, through presentations by international experts from academia, governments, international organisations and civil society.

**To register:** Please contact [ina.tessnow-vonwyssocki@univie.ac.at](mailto:ina.tessnow-vonwyssocki@univie.ac.at), indicating your name and institution.

**More information:** [MARIPOLDATA Ocean Seminar Series](#)



## 1. General Context of MGRs in BBNJ

- Marine Genetic Resources (MGRs) in areas beyond national jurisdiction are currently not comprehensively regulated under existing international agreements.
- A new legally binding agreement for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ) seeks to fill this gap by addressing the access and benefit-sharing of MGRs.
- Many existing agreements are relevant to the governance of MGRs
- The final round of the BBNJ negotiations was postponed due to the Covid-19 pandemic, but is supposed to be finalized this year (2021). Many unresolved issues remain despite an interactive intersessional period among state delegated and non-governmental organizations.

## 2. Who owns the ocean?

**Reading 1: Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources (Vierros et al. 2016)**

Despite written half a decade ago, in 2016, issues mentioned in the article by Vierros et al. are still very relevant today. The article gives a picture of the environmental significance of marine genetic resources and underlines that the deep sea is largely unexplored. In this regard, the Ocean can be seen as a “large reservoir of untapped genetic resources”.

Since the 1960s, marine genetic compounds have been used to develop products, and are today the source of a number of pharmaceutical, biofuel or cosmetic products.

The article introduces the concept of marine genetic resources (MGRs) and shows that the everyday lives of many of us are intertwined this concept with the many and diverse products and applications connected to MGRs.

Any yet, while this gives a better idea what MGRs are and can be, yet, the legal definition is not yet resolved during the ongoing negotiations for the conservation and sustainable use of marine biodiversity beyond national jurisdiction (BBNJ).

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It is suggested that commercial interest in MGRs is growing, when considering the increasing number of patents.

An important issue in this regard is the fact that access to MGRs is unevenly spread across the globe, as it requires financial capacity and technology that is not available to all states. More than 90% of all patents are owned by only 10 countries alone- the top 3 states owning patents being- US, Germany and Japan (around 70%).<sup>1</sup> This implies that the benefits from MGRs are currently unevenly shared across nations.

While the Convention on biological diversity, with its Nagoya Protocol, regulates benefit-sharing of genetic resources found *within* national jurisdiction- MGRs found *beyond* national jurisdiction are not subject to any legal mechanism for access and benefit sharing to date- which is supposed to be addressed with the BBNJ negotiations.

The ethical implications and the potential of capacity-building and the transfer of marine technology to support to close this gap are further discussed in the article.

### 3. The Legal Status of Marine Genetic Resources in BBNJ

Reading 2: Chapter 3 The Legal Status of Marine Genetic Resources in the Context of BBNJ Negotiations: Diverse Legal Regimes and Related Problems (Marciniak, 2020).

## 4. Questions & Discussion

#### The Role of Science in the BBNJ Negotiations

Science plays an integral role in regarding the MGR package within the BBNJ negotiations. It is regarded as important that scientists share their experiences from marine scientific research in order to tell policy-makers “how MGRs are used” and to identify the scientific aspects. Within the BBNJ negotiations, several scientists within national delegations and NGOs inform about the scientific terminology and how it works in practice. Most of the state delegations seem to have “their own scientists”.

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<sup>1</sup> See also: Blasiak, R., Jouffray, J., Wabnitz, C., Sundström, E., & Österblom, H. (2018). Corporate control and global governance of marine genetic resources. *Science advances*, 4, eaar5237. doi:10.1126/sciadv.aar5237  
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## Freedom of the Seas vs. Common heritage of [Hu]mankind

The two legal principles Freedom of the High Seas and the Common Heritage of Mankind, are enshrined in the Constitution of the Law of the Sea. The former regards the freedom to access and use the water column in the High Seas (that is in areas beyond national jurisdiction). This regards activities, such as fishing, navigation, overflight and scientific research. If consistent with the provisions of UNCLOS these freedoms are guaranteed under international law. However, the exception to this is the ocean floor, seabed and subsoil thereof in areas beyond national jurisdiction (the so-called “Area”). The “Area” and its resources are declared the common heritage of (hu)mankind, implying that benefits from these areas need to be shared amongst humankind.

Generally-speaking, developing countries were supportive of the inclusion of the principle into UNCLOS, as it guaranteed them a share of the benefits.

In recent years, the debate has arisen regarding marine genetic resources in areas beyond national jurisdiction (ABNJ). Within the BBNJ negotiations, the debate has sparked many years of negotiation whether marine genetic resources in the legal way could or should fall under the principle of common heritage of (hu) mankind.

Getting into the final round of negotiations, this issue has not been resolved among state delegations.

### How to share benefits?

There are different kinds of benefits that can be associated with MGRs in ABNJ. On the one side, there are monetary benefits, meaning financial gains from products developed on the basis of MGRs. On the other side, there are non-monetary benefits, which include a variety of issues ranging from taking developing countries’ scientists on board of research vessels, over training in laboratories, to the sharing of information, data, publications and lastly, digital sequence information. Difficulties in differentiating scientific research for academic purposes versus for commercial interest have been voiced throughout the negotiations, as indeed, oftentimes, the development of a product happens years or decades later, based on further research and does not necessarily have to be linked to the initial motivation of the researcher collecting the sample at sea. At the heart of the debate lays the discussion that marine scientific research in ABNJ is costly and requires technological advancements that are often lacking by low-income countries, but that the areas that lay beyond national jurisdiction and their resources should not be unequally exploited by few. Research on digital sequence information of MGRs that might be followed by the development of products, is also based on technologies and expertise. It remains to be seen which kind of benefits will be shared with the final adoption of the new agreement.

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## The Role of the Clearing House Mechanism

Directly linked to benefit-sharing of data, information and knowledge is the clearing house mechanism. The new agreement foresees a clearing house mechanism for the collection and sharing of data to assist the implementation of the aim to conserve and sustainably use marine biodiversity. This data base is meant to include data, relevant for all BBNJ package elements, apart from MGRs also regarding area-based management tools, including marine protected areas, environmental impact assessments, and capacity building and the transfer of marine technology. At this stage, it cannot be predicted which forms of data will be collected and how it will be shared or made public. Questions remain about to what extent existing databases are sufficient and where other databases can or should be created and hence, how the databases can be linked. Also the content is still a key topic under discussion, whether and how to include digital sequence information into mandatory or obligatory information sharing.

We thank Dr. Konrad Marciniak for his insights and all Ocean Seminar Series Participants for the engaging discussion.

[Here](#) is an overview of the program for the Ocean Seminars Series of the first half of 2021.

We are looking forward to the upcoming Sessions!

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