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MARIPOLDATA Ocean Seminar

"So near and yet so far:
Prospects for the conclusion of a BBNJ Treaty in August 2022"
10th August, 2022

Guest Speaker: Assoc.- Prof. Joanna Mossop



Joanna Mossop is an Associate Professor in law at Victoria University of Wellington, New Zealand. She has written extensively on the law of the sea, and has been following the negotiations of the BBNJ treaty as an observer on the New Zealand delegation (all views expressed are her own). In 2019 the New Zealand government nominated her to the list of arbitrators and conciliators under Annexes V and VII of the United Nations Convention on the Law of the Sea. She has provided support to the Oceans and Coastal Group of the IUCN Commission on Environmental Law, and has consulted for the UNDP. She is currently the New Zealand Vice-President of the Australia New Zealand Society of International Law and a co-chair of the Oceans and International Environmental Law Interest Group.

Reading Material for the Session:

"Journey to Realisation" (Lee, 2021)

Most recent draft text to be negotiated at the currently ongoing Intergovernmental Conference (IGC5): in all official UN languages:

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FCONF.232%2F2022%2F5&Language=F&DeviceType=Desktop&LangRequested=False>

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 Maripoldata.erc@univie.ac.at, indicating your name and institution.

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

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1. General Context

- The 5th and planned-to-be final round of negotiations for the legally binding instrument for the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) is happening from August 15-27 in the New York UN-headquarters
- After discussions in Ad-hoc Open Ended Working Group and Preparatory Committee Meetings, the negotiations started formally in 2018 and after a postponement due to COVID-19 are now in the extended and planned-to-be-final round
- Main issues remain unresolved in all package elements and compromise by Parties is required to achieve consensus in the coming weeks

2. Main Take-Aways

- Even though the BBNJ Agreement is a legally binding agreement to ensure that Parties take steps towards the conservation and sustainable use of marine biodiversity (the purpose of the agreement) beyond the four focus areas, it would need to include a **separate provision on the conservation and sustainable use to make it an *obligation*** to states
- Previously, other implementing agreements of UNCLOS have changed key provisions of UNCLOS
- To achieve compromise and finalise an agreement in IGC5, Parties will need to lay out their red lines and negotiation flexibility in this final round of negotiations
- Key issues to be resolved in the negotiations are:

MGRs: how to share benefits; in how far to include monetary benefits

ABMTs/ MPAs: how to manage the interplay with existing instruments

EIAs: to what extent to involve the international community in the EIA process

CBTMT: mandatory vs. voluntary CBTMT

Cross cutting elements, including voting procedures of the COP, the roles of the Clearing House Mechanism and Scientific and Technical Body

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Ina Tessnow-von Wysocki, August 2022

3. Introduction

Readings:

We provided a background reading written by the president of the conference, Rena Lee, on the “The Journey to Realisation” – still very relevant for these upcoming negotiations:

Lee, R. (2021). "Chapter 1 The Journey to Realisation". In *Marine Biodiversity of Areas beyond National Jurisdiction*. Leiden, The Netherlands: Brill | Nijhoff. doi: https://doi.org/10.1163/9789004422438_002

Also, please find the **updated draft text for IGC5** in all official UN languages: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FCONF.232%2F2022%2F5&Language=E&DeviceType=Desktop&LangRequested=False>

Introduction to BBNJ

The first MARIPOLDATA Ocean Seminar is very timely for the upcoming negotiations in New York on conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.

The negotiations have been around for quite a while, with formal negotiations starting in 2018, and long discussions that preceded this official start. We also experienced the challenges of the COVID-19 pandemic, where the negotiations had to adapt to the changing circumstances and switch to informal online dialogues¹.

Until finally, in March this year, negotiations could formally continue - even though not all stakeholders were able to participate in person².

This is why we are particularly excited about this 5th and – potentially – final session of the BBNJ negotiations, to hopefully conclude the legally binding agreement for the future of marine biodiversity. The MARIPOLDATA Team is observing the negotiations in New York on-site and online.

The BBNJ agreement is supposed to cover four package elements, which were agreed on in 2011: Access to and the Fair and Equitable Sharing of Benefits arising from Marine Genetic Resources (MGRs); establishment of Area-based Management Tools (ABMTs), including Marine Protected Areas (MPAs); the conduct of Environmental Impact Assessments (EIAs) and Capacity Building and the Transfer of Marine Technology (CBTMT).

¹ See: <https://highseasdialogues.org/>

² <https://oneoceanhub.org/participation-at-bbnj-negotiations-matters/>

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4. So near and yet so far:

Prospects for the conclusion of a BBNJ Treaty in August 2022

Presentation by **Joanna Mossop**

- BBNJ in context
- How BBNJ is related to other existing international agreements
- Prospects for the negotiations in August 2022

5. Questions and Discussion

Can BBNJ change provisions of UNCLOS?

Joanna Mossop explained the contents of the other two implementing agreements under UNCLOS: the 1994 Agreement relating to the implementation of Part XI and the 1995 Fish Stock Agreement. Interestingly, those instruments changed the key provisions of UNCLOS, which does not seem to be envisioned for the BBNJ agreement. It is rather intended to update and modernise the Convention.

Missing element in the BBNJ Draft Text

While UNCLOS sets out the obligation to protect and preserve marine environment, the BBNJ Agreement is currently still missing an explicit obligation for Parties to conserve and sustainably use marine biodiversity.

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Different Actors in the Negotiation

Joanna Mossop grouped the Parties to the Negotiation into three categories:

Developing Countries: e.g. G77; Small Island Developing States (SIDS)

Large Ocean Users: e.g. Industrialised Countries and states with interests in fishing, mining, biotechnology, likely to participate in Regional Fisheries Management Organisations (RFMOs)

High Ambitious Countries: Countries that envision a BBNJ Agreement to lift environmental protection standards beyond those in UNCLOS and envision existing instruments (such as the International Seabed Authority (ISA), to see the importance of biodiversity.

An ambitious treaty would ensure procedures for environmental protection, capacity building and essentially support lifting standards of environmental protection beyond those in UNCLOS. In this regard, existing bodies and frameworks, such as RFMOs, ISA, IMO and others, would need to realise the importance of biodiversity and take action to complement the BBNJ agreement.

The troublesome MGR section

One of the most difficult issues in the negotiations is probably the package element on MGRs and the question of application and on whether sharing of monetary benefits arising from MGRs of ABNJ are required to be shared with the international community.

Here, the Principle of the Common Heritage of Mankind has been a point of debate and disagreement since the Ad-Hoc Open Ended Working Group sessions in 2006 in the BBNJ process, with the origin of the debate dating back until the UNCLOS negotiations. Developing countries have had a strong preference for the inclusion of the principle, whereas large ocean users have been worried about consequences of implementation with the inclusion of the concept as a principle. There might be a possibility to circumvent the term of the concept, while still meeting developing countries' interest in fair and equitable benefit sharing, to which this concept is now increasingly linked. Further questions include the application of the agreement regarding access to and sharing of benefits form MGRs *in situ*, vs. *ex situ* (from repositories) and *digital sequence information (DSI)* and *derivatives*.

Seminar Participants see potential avenues for compromise in removing direct payments to developing countries by providing monetary benefit sharing through a fund, established by the BBNJ agreement to finance CBTMT. This idea is reflected in the current draft text under Art 11 Option 2) 9:

“The payments shall be made through the financial mechanism established under article 52, which shall distribute them to Parties to this Agreement, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States Parties, [in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island

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developing States, coastal African States and developing middle-income countries,] in accordance with mechanisms established by the access and benefit-sharing mechanism.”

As MGR benefits are considered as a potential source of income by developing countries, in a way, benefit sharing can be considered capacity building. If benefits arising from MGRs in ABNJ could be channelled into such a financial mechanism, they could then be used for developing countries to support their implementation the BBNJ agreement.

How to draw areas of protection in the ocean space? : ABMTs/MPAs

Questions in the ABMTs section remain on the relationship between BBNJ and existing bodies ad frameworks. Can the COP establish ABMTs where other organisations exist with geographical mandates over these areas? While it might be unlikely that Parties agree to that, joint COP decision-making with other existing institutions bears hope for holistic coordination. In this way, the COP could create ABMTs/MPAs with measures that complement and support what is already being regulated under other agreements.

Evaluating impact on biodiversity in international waters: EIAs

In the question on the conduct of EIAs, there was some movement in IGC4, coming up with a bit of a compromise between the originally divergent views on the threshold. While ocean users generally supported the definition referring to activities that “may cause substantial pollution of or significant and harmful changes to the marine environment”, ambitious states highlighted the need for the threshold to be based on the Antarctic Treaty, namely when the activities “are likely to have more than a minor or transitory effect on the marine environment” “significant or harmful changes to the marine environment”. Now there is an in-between option in the current draft.

Views still diverge on the discussion what the role of BBNJ should be in the case where there are existing frameworks and bodies. The question is, should an EIA in this case not be required or should BBNJ still be able to set global standards that need to be met?

Capacity Building and Transfer of Marine Technology

Key issues in the CBTMT section include mandatory vs. voluntary provisions. As mentioned above, in this regard a financial mechanism for supporting the developing countries in the implementation of the agreement could be a possible solution to settle divergence.

Cross cutting Issues

Issues that are relevant across all package elements – so called cross cutting issues- include among others, negotiations on the new Scientific and Technical Body and Clearing House Mechanism, the voting procedure for COP decisions (consensus vs. majority voting); dispute settlement, which will be subject of negotiation in the IGC5 and significant for a holistic implementation of the agreement to meet the objectives.

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How to achieve compromise in the last negotiation round?

Options for compromise could include moving away from terminology that is unacceptable for some states and rather looking into what elements of the principles and concepts are crucial to Parties. In the final round of negotiations, it is time to put the cards on the table to reflect on red lines and potential space for flexibility.

Despite the categorisation into the groups of developing, ocean user and ambitious states, it is clear that already a number of Parties fall into several of those categories. For instance, the Pacific Small Island States (PSIDS) are *developing states* but can also be grouped under *ambitious countries*, same can be said for the EU, which was grouped by the participants into the category *large ocean users* and at the same time under *ambitious countries*.

Joanna Mossop highlighted the need to identify possible elements of compromise over these weeks of negotiation. As some examples show, indeed, large ocean users can see value in an ambitious agreement. She emphasises that now is the time for state representatives to reveal the basic underlying positions.

Does the title of the Agreement fit its objectives?

How do all these issues of the package (MGRs, ABMTs/MPAs, EIAs, CBTMT) reflect the objective of the agreement being conservation and sustainable use?

The package element was agreed on in 2011 for the agreement to focus on these 4 elements, but of course there are other issues of conservation and sustainable use of marine biodiversity in ABNJ. Some states were concerned about the impact of the treaty and wanted to take sure to exclusively focus on those, to exclude broader issues. Joanna emphasised that BBNJ agreement can serve a broader purpose - by looking at cross cutting issues and including important principles such as ecosystem-based approach, precaution and stewardship to name a few. It can be suggested that the COP gets a broad mandate, so it can pick up new issues that are relevant.

With a general statement for all Parties to take steps and recognise their obligation for the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction, this would include the obligation to take steps towards this purpose without being limited to the 4 package elements that are the focus of the agreement. As experts from the audience also highlighted, while the focus have been the package elements, the actual mandate does not exclude broader topics to conserve and sustainably use marine biodiversity.

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Universal Participation vs. Ambition

A key question with international agreements is the balance between seeking universal participation versus an ambitious outcome. Ambitious content generally reduces the number of participants that become Parties to the agreement.

The difficulty is in drafting the treaty ambitiously enough to meet the goals, but to also guarantee a broad enough participation by Parties. Rena Lee, the president of the conference, has continuously emphasised the importance of full participation, considering the nature of the high seas, and encouraged to have all states on board.

Importance of Implementation/ Compliance for BBNJ

With the signature and eventual ratification of the agreement, the BBNJ process is by far not concluded, of course. After successful adoption, Parties will need to comply with the terms of the agreement and it will need to be implemented. Many existing instruments have an enforcement mechanism in place to ensure effective implementation. Even if no hard enforcement mechanism can “force” Parties’ regulation in the ocean that belongs to no one and everyone at the same time, soft arrangements, such as financial assistance can incentivise and enable compliance and bring the BBNJ agreement a step closer to success. While under this consideration of the global commons, no one can be excluded from trade - like it is used in other agreements, such as CITES - incentives for compliance can be set. The current draft text includes an Implementation/ Compliance Committee, which would serve such use. A study looking at this issue in a number of agreements showed that only those that include an enforcement mechanism have an effect³.

Forum Shopping with other international processes?

The Seminar participants identified links between the BBNJ negotiation and other existing and ongoing processes. There were concerns by participants that states might engage in “forum shopping” when issues overlap into different international processes. This implies that Parties to different agreements that serve similar issues sometimes represent contradicting positions in the different fora. Also problematic is that sometimes responsibility for certain issues is shifted between different fora, e.g. the BBNJ and the United Nations Convention on Climate Change (UNFCCC) or the Convention on Biological Diversity (CBD). Hereby, it is important that emerging instruments complement one another. A complimentary approach among different agreements is suggested, such as between the BBNJ and ISA, where experience can be exchanged.

³ <https://www.pnas.org/doi/10.1073/pnas.2122854119>

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Going into IGC5

Attendance to IGC5 is possible on-site and online for registered participants. Process and procedure will remain to be seen, as it can flexibly adapt throughout the weeks. While breaking into informal informals – where the “deals can be made” – have been proven to be effective for going forward, it will be important to ensure participation of civil society and to meet smaller delegations’ concerns with parallel sessions. IUCN have provided recommendations for the draft text to be considered in the last negotiation round⁴.

In the 5th session it is now crucial - more than ever- that pragmatic solutions are found and good ideas are suggested to delegates.

The MARIPOLDATA Team is happy to contribute further to keeping the momentum by bringing together policy-makers, scientists, and civil society from around the world in the monthly Ocean Seminars to discuss relevant ocean issues and present timely research, inviting experts in the field.

We thank Joanna Mossop for the presentation and discussion on BBNJ in the lead up to IGC5.

The MARIPOLDATA Team is looking forward to upcoming sessions!

Next session: Sept 14th on

Identifying and Describing Ecologically or Biologically Significant Marine Areas (EBSAs): A Key Tool for the Protection of Ocean Biodiversity in Dispute

Wednesday, September 14, 2022 | 5.00-6.30 pm (CEST)

Christian Prip

Senior Research Fellow, Fridtjof Nansen Institute

⁴ <https://www.iucn.org/story/202207/iucn-gearing-igc5>

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