British Institute of International and Comparative Law

Analysing the Biodiversity Beyond National Jurisdiction Treaty

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To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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Introduction

On 4 March 2023 global negotiations concluded on the landmark Treaty of the High Seas to protect the ocean, tackle environmental degradation, fight climate change, and prevent biodiversity loss.[1] The British Institute of International and Comparative Law (BIICL) held a Rapid Response Webinar event on 19 April 2023 that convened a panel of experts to discuss legal issues relating to the new treaty, also known as the Biodiversity Beyond National Jurisdiction treaty (BBNJ). The treaty lays the groundwork for marine protections over previously unregulated waters. Its primary aim is to protect biodiversity by establishing large-scale marine protected areas and regulating marine research for scientific and commercial development. The event was convened by Dr Jack Kenny, Research Fellow in International Law, BIICL.

The event featured a chair with significant experience in the area, Ms Fernanda Millicay, Permanent Representative of Argentina to the IMO, and four expert presenters. The first two presenters addressed aspects related to the core of the BBNJ package, while the second two speakers touched upon different nuances, one addressing a systemic issue which is compliance and dispute settlement, and the last speaker addressed the specific implications of this agreement to the Arctic Ocean governance. The speakers presented in the following order: Lydia Slovakian from Georgetown Law presented on the common heritage of mankind and its relationship to the principle of equity, Professor Marcel Jaspars from the University of Aberdeen presented on marine genetic resources as part of the BBNJ treaty, Dr Efthymios Papastavridis from the University of Oxford presented on the implementation and enforcement as well as dispute settlement of the BBNJ, and Professor Yoshifumi Tanaka of the University of Copenhagen presented on the implications of the new BBNJ agreement on Arctic Ocean governance. The panel then took questions from the chair and online audience.

BIICL extends its gratitude to all the panellists for their outstanding contribution to the discussion and to all attendees for their support of the event.

Suggested Citation:
British Institute of International and Comparative Law, 'Analysing the Biodiversity Beyond National Jurisdiction Treaty' (19 April 2023)

[1] Available at 'Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction' <https://www.un.org/bbnj/> accessed 11 May 2023.

Lydia Slobodian, Georgetown Law: The common heritage of mankind and its relationship to the principle of equity

One of the core struggles in governing areas beyond national jurisdiction is determining the legal status of the high seas and the allocation of rights to its resources. Understanding the different maritime zones established in these areas is essential to address this question. The UN Convention on the Law of the Sea (UNCLOS) delineates distinct areas based on sovereign rights and jurisdiction. The territorial sea refers to the coastal area, followed by the exclusive economic zone extending up to 200 nautical miles from the coast, within which national jurisdiction applies. However, challenges arise beyond national jurisdiction.

The high seas pertain to the water column from 200 nautical miles to the open ocean. Meanwhile, the seabed and subsoil fall under a separate regime known as "the Area". The Area and the high seas are subject to different legal regimes and principles. This division is not rooted in scientific reasoning, logical legal principles, or technical considerations. Instead, it stems from negotiations. This is the background to one of the thorniest issues in the negotiation: the problem of competing principles.

The Area and its resources, under UNCLOS, are governed by the principle of common heritage of humankind. The term "humankind" was introduced to ensure gender inclusivity. The common heritage concept has specific implications: resources classified as common heritage cannot be appropriated, subjected to claims of state sovereignty, or used for non-peaceful purposes. They are subject to freedom of access and freedom of scientific research. Individuals or entities can utilise these resources, but sustainability is a prerequisite, and such utilisation is subject to equitable sharing of benefits.

However, it is unclear from UNCLOS to what extent this regime applies to biodiversity in areas beyond national jurisdiction. It seems to be limited to the Area, that is, the seabed, and not the water column. UNCLOS specifies that 'the Area and its resources are common heritage of humankind,' and elsewhere defines resources as mineral resources. Some argue that this definition restricts resources to mineral resources alone and excludes biological resources. This unresolved issue leads to differing positions among states.

Conversely, the high seas are subject to the principle of freedom of the high seas. This principle allows for the appropriation of resources without the requirement for sharing of benefits. The question of whether the resources in the high seas and the Area should be considered common heritage resources or subject to the freedom of the high seas has been a fundamental point of contention throughout the negotiations.

Since the early 2000s, this debate has intertwined with discussions on the meaning and implementation of equity within the agreement. In international environmental law, equity is discussed in terms of intergenerational (obligations to future generations) or intragenerational equity (the need for equity among living generations). In negotiations it was unclear whether discussions of equity referred to intergenerational or intragenerational equity, more so it was used in a way that may be considered a conflation with the fair and equitable sharing of benefits.

Ultimately, negotiators managed to reach an agreement that incorporates the principles of common heritage of humankind and equity, with an emphasis on fair and equitable sharing of benefits. However, considerable ambiguity and uncertainty persist regarding these principles and their practical implementation, as well as their implications for the governance of areas beyond national jurisdiction.

Professor Marcel Jaspars, University of Aberdeen: Marine genetic resources as part of the BBNJ treaty

Contrary to the term "bioprospecting," the bioresources are not mined but rather inspiration from nature is replicated using different methods. This distinction is important to understand the process accurately as bioresources are not oversampled; only small samples are taken to develop new products. Examples include medicines, such as recent discoveries in COVID-19 treatments, enzymes for DNA replication, and other biochemical and biological tools. The global market for marine biotechnology is estimated to be around $12 billion by 2025, but specific data on the BBNJ share in this market is lacking. There is currently work tendered by the EU that is underway to gather this information, and baseline data is expected to be published by early 2024.

Moving on to the sharing of benefits, which is the most contentious part of the BBNJ package deal, the main issues revolve around monetary and non-monetary benefit sharing, of jurisdiction and the organisms involved pose additional challenges, as they move between different areas, including the high seas, and are subject to various agreements such as the Nagoya Protocol, UNCLOS, or the new BBNJ treaty. Dealing with these boundary conditions can be complex, but the new treaty aligns with the Nagoya Protocol, hopefully ensuring concordance between the two treaties.

Another important point is that the Nagoya Protocol is a bilateral contractual agreement, while the BBNJ treaty is multilateral where every state has the right to access marine genetic resources beyond areas of national jurisdiction. It is reassuring to see that the concept of common heritage of humankind and the principle of equity have been included in the new treaty. Early proposals made by scientists,[2] including the idea of an obligatory electronic notification, have been incorporated. This facilitates access and information sharing, allowing researchers to share their plans and update records once the materials are collected.

Some proposals by scientists have been included in the current version of the treaty. The concept of an exclusivity period did not make it into the final version of the treaty, though some elements of updating your record online, for example in relation to providing an indication of publishing papers and securing a patent, remains within the text. Monetary benefit sharing royalties to be paid on commercialisation at a fixed percentage by sector was also discussed, and something of that type was eventually included within the text. These elements are part of the final treaty, but the specific details of implementation are still being determined.

Several issues arose during the treaty negotiations concerning marine genetic resources. These included the definition of marine genetic resources and various other aspects related to biotechnology, the issue of marine genetic resources and digital sequence information, monetary and non-monetary benefits, whether fish should be included or excluded from the treaty, and the importance of the prior notification system and the use of identifiers to ensure traceability of materials in a transparent manner.

In conclusion, the speaker expressed hope that the new treaty will successfully balance the interests of all stakeholders and promote the sustainable use of marine genetic resources, where many of these issues could be addressed with reference to good scientific practice.

[2] See Arianna Broggiato and others, 'Mare Geneticum: Balancing Governance of Marine Genetic Resources in International Waters' (2018) 33 The International Journal of Marine and Coastal Law 3.

Dr Efthymios Papastavridis, University of Oxford: Implementation, enforcement and dispute settlement of the BBNJ

The BBNJ agreement, which has been under negotiation for 19 years, is set to be officially adopted in June of this year. While the ratification of a treaty is clearly important, its effectiveness ultimately relies on its implementation.

One specific provision worth noting is Article 20, which addresses marine protected areas and area-based management tools. This article emphasises that states must ensure that all activities under their jurisdictional control comply with measures concerning the protection of marine protected in areas beyond national jurisdiction. Notably, it allows states to adopt more stringent measures with respect to vessels flying their own flag or their own nationals. This provision aligns with established international law, such as Article 39 of the European Union regulation on fisheries, which obliges states to control the actions of their nationals. Article 53 deals generally with implementation of the Convention in states taking all relevant measures to ensure compliance with the agreement, contains reporting obligations, and establishes a compliance committee.

However, there are missed opportunities in the provisions, and more work needs to be done to strengthen them. A comparison with the previous agreement, the 1995 Fish Stocks Agreement under UNCLOS, reveals the need for improved measures. For example, the latter featured robust enforcement mechanisms including a provision for flag state enforcement, flag state inspection between state parties, and port state enforcement. All these are missing both in terms of marine protected areas and in the general implementation elements of the BBNJ treaty. To address this, the Conference of the Parties could consider adopting additional measures and surveillance tools to enhance the agreement's implementation.

Turning to dispute settlement provisions, Article 54 onwards, with Article 55 outline mechanisms for resolving disputes related to data protection, enforcement, and implementation of the agreement. Each state has the freedom to choose their means of resolving disputes, with a reference to the basic provisions set out in Part 15 of UNCLOS. References to Part XV and the judicial fora under Article 287 were also included in the Fish Stocks Agreement; however, it is interesting to note that to date there has been no use of Part 15 under the latter agreement. Whether this will change with the new agreement remains to be seen.

An additional point of interest is the application of dispute settlement provisions to non-state parties, such as the United States or Israel, which may choose to sign the new agreement despite not being parties to UNCLOS. These parties would be subject to dispute settlement provisions under Part 15, but the possibility of using optional exceptional Article 298 raises questions regarding its relevance to the disputes concerning BBNJ.

The new treaty introduces the potential for advisory opinions by ITLOS under Article 48, paragraph 6. ITLOS has previously displayed a progressive approach in interpreting UNCLOS and offering valuable insights on environmental matters, as evidenced by the 2015 advisory opinion upon the request of the Sub-Regional Fisheries Commission. This suggests that ITLOS may play a significant role in shaping the interpretation and implementation of the BBNJ treaty.

Professor Yoshifumi Tanaka, University of Copenhagen: Implications of the new BBNJ agreement on Arctic Ocean governance

In light of the particular vulnerability of the Arctic environment including marine biological diversity, an effective legal framework for promoting international cooperation is crucial. However, international cooperation in the Arctic has been hampered by Russia's invasion of Ukraine, leading to the suspension of all official meetings of the Arctic Council. Prevention of international cooperation through the Artic Council undermines the effectiveness of the protection of the marine Arctic. Therefore, exploring alternatives to strengthen a legal framework for the protection of the Arctic marine environment is necessary. Considering this issue, the implication of the new BBNJ treaty, in particular, the procedures for environmental impact assessments (EIA), for the protection of the Arctic marine environment merits further consideration.

The general framework governing the marine Arctic environment is provided by the UN Convention on the Law of the Sea (UNCLOS) and the general legal framework is amplified by global multilateral environmental treaties, such as the 1995 Fish Stocks Agreement and the Convention on Biological Diversity, and regional environmental instruments, including the 2017 Polar Code and the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Arctic Ocean. These instruments form the principal sources of the Arctic legal system for marine environmental protection.

The Arctic legal system is characterised by three key elements. Firstly, it lacks institutionalised machinery for formulating norms governing the Arctic. The Arctic Council, while providing an intergovernmental forum, is not a legislative body and cannot adopt treaties. As a result, legal instruments for the protection of the marine arctic have been developed in a piecemeal fashion. Secondly, there is no institutionalised machinery for adopting legally binding measures in the Arctic. Finally, compliance procedures in the Arctic legal system are not well-developed, relying on the goodwill of states. This decentralised legal system has limitations with regard to the timely formulation and effective implementation of environmental norms and measures.

In light of this, consider how the BBNJ agreement contributes to reinforcing the Arctic legal system and better protecting the environment of the Arctic. Part Four of the BBNJ agreement provides detailed rules on EIA. The BBNJ agreement highlights four noteworthy features of EIA:

1. The agreement provides the obligation to conduct an EIA in areas beyond national jurisdiction, a transboundary EIA, and the obligation to consider conducting strategic environmental assessments (Articles 22 and 41 ter). This marks a milestone in providing a clear obligation to conduct EIAs in areas beyond national jurisdiction.
2. The agreement specifies the contents of an EIA, providing more detail on this process than what has been provided by the ICJ jurisprudence and UNCLOS.
3. It clarifies the process of EIA in a manner that ensures transparency and accountability. In this regard, timely public notification and consultation are crucial to enhance transparency and accountability of EIA.
4. The agreement recognises that third-party control of the EIA process is crucial.

The BBNJ agreement applies to the high seas in the central part of the marine Arctic. While the extent of the continental shelf beyond 200 nautical miles is uncertain, some areas of the seabed would likely fall under the treaty's jurisdiction. Once in force, the BBNJ agreement could address the shortcomings of the Arctic legal system by incorporating EIA procedures.

Climate change is increasing accessibility to the Arctic, resulting in heightened activities in the region. In this context, it is of particular interest to note that incorporating Indigenous Peoples' traditional knowledge and involving local communities is emphasized in the BBNJ agreement to ensure their participation in EIAs. Arguably, the BBNJ agreement can open the way to enhance the role of Indigenous Peoples and local communities in the process of EIA.

Q & A

During the questions and answers session, several questions were posed by the chair to the panel as raised by the audience to facilitate further discussion. The first question addressed whether there is a gap in the treaty concerning liability and compensation for environmental damage beyond national jurisdiction. The question also touched upon the need for further development of international law in this regard. The speaker acknowledged the existence of a gap in the treaty, as it lacks a primary obligation for liability and compensation that exists in other treaties of environmental law. The current approach suggests referring back to the rules of state responsibility. The issue of who will be invoking liability and reparation for damage caused by a state in violation of the treaty's obligations was highlighted as an interesting aspect that requires further exploration.

Another question focused on the provisions of dispute settlement, areas that might not entail the traditional types of bilateral disputes, where the role of the Seabed Disputes Chamber of UNCLOS was not replicated. The potential for an enhanced role for advisory opinions by ITLOS was also raised, particularly regarding the common heritage of mankind. The speaker emphasised the importance of addressing these questions in relation to obligations *erga omnes* and *erga omnes partes*. The involvement of multiple parties and the legal interests of various stakeholders in bringing inter-state disputes were highlighted. Additionally, the potential role of the environmental implementation committee in proposing recommendations for compensation of damage caused by a state's activities was mentioned.

Further questions were posed regarding the adoption of an ecosystem resilience approach and the exemption of fishing in the treaty. The speaker clarified that the exemption for regulated fishing and the distinction between fishing as commodities and fishing as genetic resources fall under the part concerning marine genetic resources. The objective is to avoid overly broad regulations that could burden existing fisheries organisations and to support coordination with regional or sectoral organisations. A speaker added that the access to digital sequence information should not be restricted, and the promising decision made in December at the Convention on Biological Diversity (CBD) was that sharing additional scenes information should be across all different instruments. It should be efficient, practical, effective, and consistent with open access to data. This is important for current scientific research, biodiversity conservation, and sustainable use. However, the CBD decision has not been operationalised yet.

The chair posed a question that touched upon the issue of EIA and its relation to the Antarctic treaty. The question raised the usefulness of the Conference of the Parties observing the practices of environmental impact assessments in the Antarctic treaty, considering its different organisational and governance structure. The speaker acknowledged the relevance of the issue and highlighted that the Antarctic treaty system has its own environmental protocol and its own procedures for EIA. Therefore, the comparison of procedures between the BBNJ agreement and Antarctic treaty system, in particular the Madrid Protocol, was mentioned as a potential avenue for further analysis.

Finally, the topic of patenting, particularly regarding living resources, was briefly mentioned. The speaker noted that patenting issues were deliberately left outside the scope of the treaty, and the Conference of the Parties may play a significant role in addressing these matters. The resilience and effectiveness of the new treaty will depend on the active involvement and cooperation of states. The speaker also highlighted the cautious approach taken in framing dispute settlement provisions to exclude sovereignty issues, but acknowledged the need to observe how these provisions would be implemented.

This report was prepared by Dr Jack Kenny, Research Fellow in International Law.

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