

# The Dilemma and the Way out of Marine Protected Area Issues in BBNJ Negotiations: Benefit Sharing as a Perspective

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doi:10.56397/SLJ.2022.11.06

## Abstract

Part XIII & XIV of UNCLOS pointed out that significant differences in scientific and technical capacity hinder access to and use of marine genetic resources by all. In this paper, we analyze the dilemma and the way out of the issue of marine protected areas in the BBNJ negotiations and how China should respond from these two focuses.

**Keywords:** BBNJ, benefit-sharing, scientific capacity building

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## 1. Presentation of the Issue

On June 19, 2015, the 69th session of the United Nations General Assembly adopted Resolution 292, calling for the development of an international legally binding instrument (International Legally Binding Instrument, hereinafter referred to as ILBI) on the conservation and sustainable use of biodiversity of areas beyond national jurisdiction (hereinafter referred to as BBNJ) in accordance with the United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention). The resolution called for the development of an International Legally Binding Instrument (ILBI) on the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ), including the topic of area-based management tools such as

marine protected areas. In accordance with the resolution, a Preparatory Committee was established to consult with the parties prior to the start of intergovernmental negotiations. As the most important legislative process in the law of the sea, all parties attached great importance to and actively participated in the negotiations. Finally, the Preliminary Committee submitted its report on the substantive elements of ILBI to the UN General Assembly on July 31, 2017. At present, the 72nd UNGA has adopted Resolution 249, and the negotiations have been formally transferred to the stage of intergovernmental meetings.

Since the end of the 20th century, a large number of MPAs have been established to address the shortcomings of traditional ocean management, and those established in the high seas or other

areas beyond national jurisdiction (hereinafter referred to as ABNJ) are collectively referred to as marine protected areas beyond national jurisdiction (hereinafter referred to as ABNJ MPAs). The ABNJ MPAs will impose certain restrictions on the development and use of the high seas by each country, and therefore have led to intense negotiations between the countries and groups of countries concerned. China's 13th Five-Year Plan for National Economic and Social Development (2016-2020) proposes to "actively participate in the establishment and maintenance of the international and regional maritime order, and use various means to maintain and expand national maritime rights and interests." Therefore, how to better safeguard our maritime rights and interests and guarantee the strategic space for our maritime activities in the intergovernmental meetings is particularly crucial. In this context, it is necessary to conduct an in-depth analysis and research on the controversial focus of the negotiations.

## **2. Scientific and Technical Capacity Building and Benefit Sharing**

Scientific and technological capacity is a key factor in access to and use of marine genetic resources from ABNJ. From the deep and open ocean research infrastructure required to access marine genetic resources in their natural environment, to laboratory equipment, a wide range of scientific expertise and technical tools are required to access and use genetic resources. This is despite the relationship between rights and responsibilities and marine scientific research (Part XIII) and the relationship between development and transfer of marine technology (Part XIV) as set out in UNCLOS. However, the apparently divergent technical capabilities in science and technology prevent access to and use of marine genetic resources by all.

It is therefore time to consider the potential for at least partially establishing a benefit-sharing solution that builds on scientific and technical capacity and is based on the open framework of Parts XIII and XIV.

The imbalance in scientific and technical capacity hinders the ability of countries to participate in the benefits of scientific research, thus providing a gap for further implementation. Capturing the

benefits of scientific research while avoiding the unintended consequences of hindering scientific research or stifling innovation is one of the challenges countries face in developing BBNJ agreements.

The overall challenges faced by countries in developing BBNJ agreements are mentioned in United Nations General Assembly (UNGA) resolution 69/292 (PrepCom). The first challenge relates to the desire for benefit sharing, which would contribute to two objectives: (1) the ability of developing countries to access and use marine genetic resources beyond areas of national jurisdiction and (2) to contribute to the conservation and sustainable use of marine biodiversity. While this provides a clear desire to build capacity for benefit sharing, the exact nature of this relationship between benefit sharing and conservation and sustainable use has been the subject of detailed discussion to date. The second challenge relates to the two guiding principles mentioned in the guidelines in relation to benefit sharing in the PrepCom report: (1) "for the benefit of present and future generations"; and (2) "to promote marine scientific research and development." This highlights the need to strike a balance between access rights and sharing responsibilities, reflecting the dichotomy between presumed freedom, i.e. the urgent need for innovative solutions to balance and translate the common heritage of the high seas and humanity between these two principles, so that desirable goals are translated into tangible outcomes.

Benefit-sharing may contribute to capacity-building for access by developing countries and conservation and sustainable use of marine genetic resources beyond areas of national jurisdiction. It is important to note that the exact nature of the relationship between benefit-sharing and conservation and sustainable use has not been specifically discussed.

The Nagoya Protocol notes the importance of capacity-building in science and technology, which can be another form of benefit-sharing. Among the main forms of benefit-sharing are non-pecuniary benefits: i) collaboration and international cooperation in scientific research; ii) access to samples, data and knowledge, including publication and sharing of scientific knowledge; iii) capacity building and technology transfer,

including scientific training and access to resources, research infrastructure and technology; and iv) scientific, social and economic outcomes of research involving genetic resources, including conservation and activities for the sustainable use of biodiversity. In the ITPGRFA, four main forms of benefit sharing are defined: a) information exchange; b) access to and transfer of technology; c) capacity building; and d) sharing of benefits arising from commercialization.

According to the benefits identified in the Nagoya Protocol and the ITPGRFA, benefit sharing includes: scientific cooperation; technology transfer, including equipment, but also research results (e.g. results, samples and data), access to knowledge and training opportunities; and capacity building, including in the form of science and technology at the human and institutional levels as well as at the national, regional and global levels.

Taken together, the common forms of science and technology capacity building that can be undertaken under the BBNJ agreement are: scientific collaboration; access to the skills and research infrastructure needed to conduct research; standards and methodologies for the conduct of relevant research; access to the results of scientific research, such as data and samples and scientific knowledge; and the broader scientific and socio-economic benefits that result from research.

The Nagoya Protocol elaborates on the linkages between benefit-sharing and biodiversity conservation and sustainability contained in the Convention on Biological Diversity, which aims to create incentives for the conservation and sustainable use of biodiversity. In the face of growing threats to marine biodiversity, with so many marine species still undiscovered in 60% of the ABNJ's oceans, it is logical to pursue benefit-sharing to stimulate and promote conservation efforts that are logical for the sustainable use of biodiversity where genetic resources are valued. Science and technology are essential to understand, conserve and capture such values as benefits. However, some argue that benefit sharing, and the incidental access measures provided for in most legal instruments related to genetic resources may distract from conservation or hinder scientific research and technological innovation that support

conservation. It is important to understand the role of science and technology in access to genetic resources and benefit-sharing in order to find viable benefit-sharing solutions.

Benefit-sharing measures may be applicable to scientific research due to the lack of a definition of marine scientific research and the blurred distinction created by the loosely defined concept of marine genetic resources activities. Capturing the benefits of scientific research while avoiding the unintended consequences of impeding scientific research or stifling innovation is one of the challenges that countries face in developing BBNJ agreements. One way to avoid such consequences might be to address the BBNJ by agreeing to prioritize support for scientific research and to provide enabling mechanisms to promote its development. Such explicit support for science would serve multiple purposes: to adopt a science-based approach to conservation and sustainable use, to promote access to benefits through access to in situ genetic resources, and to insist on undisclosed requirements to create favorable conditions for international cooperation in scientific research.

UNCLOS calls for the creation of favourable conditions for marine scientific research, although no definition of the activity in question is provided. The first provides the basis for the development of guidelines and standards for marine scientific research under the provisions of the unfinished Article 251. In the context of the BBNJ agreement, such guidelines could be used for multiple purposes, including genetic resources within the scope of a consensus agreement on the range of activities considered to involve the oceans. This would help determine the extent to which benefit sharing requirements do or do not apply to the scope of the research and development process; from sample collection to isolation of molecules to development of biotechnology. The guidelines could also elaborate on ways to promote scientific research to support capacity building and technology transfer. For example, specify requirements for information sharing regarding scientific research activities through a possible clearinghouse mechanism; identify principles and standards to be used; provide guidance on information sharing regarding data and samples; and emphasize the

role of research collaboration in technology development.

Article 248 of UNCLOS sets out a number of information sharing requirements for marine scientific research within national jurisdiction that could provide a useful starting point. The Intergovernmental Organizational Committee would be the appropriate body to lead the development of such guidance, as illustrated by the development of the Intergovernmental Committee in response to the unpublished Article 271. Broad participation in the development of guidance would promote practical results, and broad support for implementation by these organizations would depend in large part on individual scientists and the research institutions that support them.

Although international cooperation in marine scientific research is mentioned in Articles 242, 243, and 244, there is little reference to it in the form of identified implementation mechanisms (e.g., institutions), or information-sharing platforms or communication channels. The same applies to references to international cooperation in development and the transfer of marine technology, for example, Article 270 recognizes that the development and transfer of international cooperation in marine technology should “promote marine scientific research, the application of transferred technology, particularly in new areas, and the funding of appropriate international marine research and development.” Recognizing these, the BBNJ Agreement can strengthen existing implementation by identifying roles and functions that propose to support the sharing of benefits required by the responsibilities of intergovernmental bodies used for regional and national marine science and technology centers.

### **3. China’s Position in the BBNJ**

As a breakthrough from traditional ocean management, marine protected areas are becoming an important tool for the international community to protect marine biodiversity, and the negotiations on marine protected areas in the ABNJ, after addressing the lack of definitions, unclear selection criteria, and controversial management models, are bound to result in a reasonable institutional framework that will further promote the development of marine

protected areas as an area-based management tool beyond national jurisdiction. The development of MPAs beyond national jurisdiction. China has already participated in the negotiations of the Preliminary Working Committee and expressed its position on this issue together with the G77. In order to gain more support for its position at the intergovernmental meeting, China should internally coordinate its position with the G-77 and strive to align the G-77’s position with China’s in order to gain political support from more countries; externally it should coordinate its position with the EU on specific issues and actively respond to the claims made by traditional maritime powers such as the US and Japan. In response to the current negotiation dilemma, China should take an open and flexible stance in general, explore in depth with other countries various possibilities to solve the current dilemma, and show a positive stance to actively participate in and promote the construction of a system of marine protected areas beyond national jurisdiction. In terms of specific issues, with regard to the definition of MPAs beyond national jurisdiction, China should support ILBI’s definition of MPAs and insist that the objective of MPAs is to achieve a balance between conservation and sustainable use of marine biodiversity, so as to ensure flexibility in the establishment of MPAs while improving the Convention.

The process of developing and implementing an international agreement on the conservation and sustainable use of BBNJ under the UNCLOS framework is a major change in the strategic interests and layout of the country in the ABNJ. China should participate deeply in this negotiation process and use it to realize China’s maritime rights and interests in the ABNJ, promote the construction of China’s “21st Century Maritime Silk Road”, accelerate the international rule of law process, and enhance China’s international discourse.

According to UNCLOS and China’s relevant domestic laws and regulations, China’s maritime rights and interests include not only the rights and interests within the national jurisdiction of China’s territorial sea, contiguous zone and exclusive economic zone, but also the rights and interests in the high seas and international seabed area of



ABNJ. The negotiation will be an arduous and complicated game of interests. The strong maritime countries, with their advanced marine science and technology and strong financial resources, claim “freedom of the high seas, first come, first served” for the BBNJ, while the weak maritime countries and small countries still insist on benefit sharing. UNCLOS grants China six freedoms in the high seas, including scientific research, and the right to exploit mineral resources in the international seabed area. The protection and sustainable use of BBNJ through international agreements will inevitably affect China’s strategic development space in the high seas and the international seabed area, and the outcome of the negotiations will greatly affect the realization of China’s maritime rights and interests in the ABNJ. In this complex international environment, China should take its participation in this negotiation as a valuable opportunity to realize China’s maritime rights and interests. With the rapid improvement of maritime technology and economic level in recent years and the further increase of international influence, China is capable of managing this international negotiation process. In the negotiation process of various rules, China should cooperate extensively with countries, international governmental organizations and international non-governmental organizations whose positions and attitudes towards BBNJ are broadly similar to China’s, so that China’s interests and demands and claims on behalf of the majority of developing countries and weak maritime countries can be presented as much as possible.

#### **4. Suggestions for China’s Response**

In the face of opportunities and challenges, China can only respond positively in order to maximize its interests in the BBNJ conservation and sustainable use negotiations:

##### *4.1 Adhere to the Concept of Global Ocean Governance*

Only by relying on global governance can we effectively solve many global problems faced by mankind and establish a truly global order. It can be said that the adoption of a resolution by the General Assembly to begin negotiations on an international agreement with legal force on the conservation and sustainable use of BBNJ is a key step toward international ocean governance. International law plays an important role in

international ocean governance and is part of the move toward the international rule of law for the oceans. Professor Zhang Yanzhuang summarizes the elements of good ocean governance as rule of law, public participation, transparency, consensus-based decision-making, accountability, fairness and inclusiveness, responsiveness, and coherence. The oceans cover nearly three quarters of the earth’s surface area, and the value they bring to all mankind is self-evident. Ocean governance, especially within the ABNJ, is not just a matter for one country or one international organization, but is the responsibility of all stakeholders. The main purpose of global ocean governance is to use power to guide, control and regulate the activities of international actors in the oceans and seas in a variety of institutional relationships in order to maximize the public interest. China should adhere to the concept of global ocean governance and seek cooperation with other countries, international governmental organizations, international NGOs, enterprises, and other actors in the negotiation of international agreements on conservation and sustainable use of BBNJ, taking into account not only China’s interests in this field, but more importantly, the interests of humanity as a whole in this field as a starting point for negotiation. On June 5, 2017, a side event of the UN Ocean Conference was held at the UN Headquarters on the initiative of the State Oceanic Administration of China, with the theme of Building Blue Partnerships for Global Ocean Governance. In his speech, UN Deputy Secretary-General Wu Hongbo highly affirmed the importance of building blue partnerships for global ocean governance to achieve sustainable ocean development. This shows that China has already insisted on practicing the concept of global ocean governance in the international community.

##### *4.2 Improving International Treaty Compliance Mechanism and Filling Domestic Legal Gaps*

Although there is no international treaty related to the conservation and sustainable use of BBNJ, there are some international treaties related to biodiversity to which China is a party, such as UNCLOS, CBD, the Cartagena Protocol on Biosafety, CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Wetlands of

International Importance especially as Waterfowl Habitat, and the North Pacific Ocean Marine Science Organization Convention, etc. Accordingly, China will develop domestic laws as China's compliance mechanism, and there are different compliance departments in these compliance mechanisms, while there is a lack of normal coordination mechanism and information sharing mechanism among these compliance departments. As a responsible power, China should improve its international treaty compliance mechanism during the negotiation process of the international agreement on conservation and sustainable use of BBNJ, so that on the one hand it can prepare for the construction of compliance mechanisms as a party to the international agreement on conservation and sustainable use of BBNJ in the future, and on the other hand it can accumulate information on BBNJ to support the negotiations. Regarding ABNJ, the only law in China is the Deep Sea Law, but this law does not specifically address the conservation and sustainable use of BBNJ, so China can set the relevant aspects through legislation. Specifically, we can follow the practice of Japan and the U.S. in formulating comprehensive ocean legislation and enact the Basic Law of the People's Republic of China on Oceans, in which the international common ocean affairs, our activities in the international seabed area and the North and South Poles, etc. should be included in the scope of regulation. Of course, in the case that China already has the political, economic and legislative conditions, this basic ocean law should be introduced in conjunction with the national ocean strategy.

#### *4.3 Strengthen Cooperation with Other Stakeholders*

Global ocean governance should be diversified, and from the perspective of governance subjects need the joint participation of countries, international governmental organizations, international non-governmental organizations, enterprises, and other stakeholders. China should strengthen the cooperation with other stakeholders in the field of BBNJ conservation and sustainable use and develop and strengthen the scope and strength of cooperation with other stakeholders. First, strengthen the cooperation with relevant countries, especially to further strengthen the dialogue and cooperation with large oceanic countries and developed countries in

deep-sea technology, such as the signing of the memorandum of understanding between China and the United States on cooperation in combating illegal drift-net operations in the high seas of the North Pacific Ocean, and the renewal of the protocol on cooperation between China and the United States in marine and fisheries science and technology. Second, to strengthen cooperation with international organizations, it is relatively easy, in terms of feasibility, to establish a locally unified BBNJ management mechanism in the region. biological resources in the ABNJ are renewable resources and strengthening conservation management at the regional level will be more conducive to the conservation of biological resources, both during the transition period before a unified mechanism is reached and afterwards. At present, there are more regional institutions, and although most of them also adopt the management method of subspecies, these organizations have already achieved certain achievements and are more familiar with the species, so strengthening regional management can reduce the cost and shorten the various preparation time in the early stage.

At the same time, compared with the international community as a whole, members of regional organizations are closer to each other in political, economic and cultural fields, and it is easier to reach agreement on biodiversity conservation and management issues. For example, the EU has accumulated a large amount of data and information on biodiversity in the high seas and has rich practical experience in the construction and management of marine protected areas, while the EU has been seeking cooperation with important international actors such as Australia and the G77 in high seas conservation, jointly promoting the conclusion of international agreements. Finally, the role of international NGOs in the field of international environmental legislation is evident.

Since the 1970s, the gradual deterioration of the environment has aroused the concern of the whole society, and international NGOs have gradually become advocates and propagators of environmental awareness, providers of environmental information, active promoters of international environmental mechanisms, links and bridges for global environmentalists, and

institutional innovators by virtue of their own characteristics of public interest, professionalism, and flexibility. Greenpeace, WWF, and other international NGOs play a very important role in international environmental legislation through their roles as issue promoters, advocates, lobbyists, convention drafters and information collectors in international legislation such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the United Nations Framework Convention on Climate Change (UNFCCC). China should make use of the Law of the People's Republic of China on the Administration of the Domestic Activities of Foreign NGOs to cooperate with international environmental NGOs, and also encourage relevant Chinese NGOs to go out of the country to seek cooperation.

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