doi:10.1017/amp.2023.86

REACHING BEYOND THE LIMITS OF NATIONAL JURISDICTION: THE NEGOTIATION OF THE BBNJ TREATY

This panel was convened at 2 p.m. on Thursday, March 30, 2023, by its moderator, Enrico Milano, of the Permanent Mission of Italy to the United Nations, who introduced the speakers: Rena Lee, President of the BBNJ Intergovernmental Conference; Lucia Solano of the Permanent Mission of Colombia to the United Nations; and Cymie Payne of Rutgers University.

Introductory Remarks by Enrico Milano*

Good afternoon everyone and welcome to this panel. My name is Enrico Milano, I am the Legal Advisor at the Mission of Italy at the United Nations in New York. I will be moderating this panel. And I will do it in a personal capacity.

The topic of today's panel is a very timely one. On the fourth of March of this year, on a late, cold, and murky New York Saturday night, the Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) agreement was approved by the Intergovernmental Conference for the negotiation of an international legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

This was a historic achievement, which was reached thanks to the collective efforts of states. And thanks to the great leadership of President Ambassador Rena Lee that we have the honor to have here among our speakers today. We have a stellar lineup of speakers. The panel is going to be accompanied by beautiful images of the oceans and their unique biodiversity thanks to the generous concession of the Schmidt Ocean Institute.

A few words of introduction of our three speakers in the order of their interventions today. On my far right, Ambassador Rena Lee, who is Singapore's Ambassador for Oceans and Law of the Sea issues at the Ministry of Foreign Affairs of Singapore. She specializes in the practice of public international law covering areas such as the law of the sea, environmental, and climate change law. And, as I guess you all know, Rena has acted as president of the BBNJ Intergovernmental Conference (IGC) since 2018. And last but not least, Rena also serves as the Chief Executive of the Intellectual Property Office of Singapore, which looks like something very detached from BBNJ, but in fact it is not.

On my right, I have my friend and colleague Lucia Solano, who is the Legal Advisor at Mission of Colombia to the United Nations. She has had a number of roles in a diplomatic capacity. She has been a member of Colombia's legal team in the cases her country has faced before the International Court of Justice, focusing especially on law of the sea matters. From 2018 to 2021, she held the position of Head of the Treaty Office in Bogotá. And between 2013 and 2018, she was legal advisor in the Colombian Embassy in The Hague. She also has had very extensive experience being directly involved in the BBNJ negotiations and we are lucky to have her here today.

* Permanent Mission of Italy to the United Nations.

And third but not least is Professor Cymie Payne, who is a member of the Rutgers University faculty and Chair of the Ocean Law Specialist Group of the International Union for Conservation of Nature's World Commission on Environmental Law. She has participated in the BBNJ negotiations as member of the International Union for Conservation of Nature (IUCN) delegation since the first preparatory committee session in 2016. She also leads the IUCN team for the request to the International Tribunal on the Law of the Sea for an advisory opinion regarding climate change.

I now turn to our first speaker, Rena. When this panel was designed, there was a certain degree of uncertainty, whether the session that we had in February and March would come to a successful conclusion. In the concept note there is a strong focus on the working methods of the conference and less focus on substantive issues. Nowadays we have an agreement that has been approved and much of the attention is on the substantive issues. But the working methods of the conference are an important part of the picture and this is probably something on which Rena Lee can expand for us.

If you look at the twentieth century history of multilateral diplomacy dealing with the law of the sea, the landscape is dotted with spectacular failures up to a certain point. The Hague Codification Conference in 1930, which had to agree on the issue of the breadth of the territorial sea, came to no agreement. As you know, the 1940s and the 1950s were an age of unilateralism, where many states asserted unilateral claims, starting with the Truman Declaration, and many other unilateral declarations extending the continent shelf and creating exclusive economic zones up to 200 nautical miles, including countries in Latin America. And we know that the First and the Second Law of the Sea Conferences achieved very limited results, until Singapore came into the picture. It was 1981 when Professor Tommy Koh became President of the Third United Nations Law of the Sea Conference. And in 1982 we had the UN Convention on the Law of the Sea (UNCLOS or Convention), just one year after.

Yesterday I was reading this collection of writings by Ambassador Koh, which is titled *Building a New Legal Order for the Oceans*, and it has a very interesting chapter on the work and methods of the Third UN Conference on the Law of the Sea. There are so many similarities with what we have experienced with the BBNJ.

The first one is a strong focus on consensus. Consensus is a word that nowadays at the UN is not a very popular one, and sometimes for good reasons. This was a strong, principled approach by the presidency back in 1981. There were only three votes on three amendments in the Conference and all of them were rejected.

The second element is the idea of package deal on the basis of an informal negotiating text. And third, but not least, the promotion of informal negotiating groups, which sometimes were driven by the president of the conference, and sometimes were spontaneously formed. That leads me to my questions. How much of that experience has informed your thinking on how to organize the work of the intergovernmental conference? What do you think was really the secret of the success in terms of working methods? Can this model work in the future for other negotiations of multilateral agreements?

Remarks by Rena Lee*

Thank you very much, Enrico, and good afternoon everyone.

My name is Rena. I am very happy to be here and let me first thank the organizers for inviting me to join you in this panel. Indeed, when I first said yes, nobody knew the outcome of what would happen in our resumed fifth session.

* President of the BBNJ Intergovernmental Conference.

But I am happy to say we got the job done. And it is now time for us to look at what it is we actually did. Thank you very much, Enrico, for those questions. In fact, last week the Center for International Law had a conversation with Ambassador Tommy Koh and myself on what were the similarities and differences between the Third UN Law of the Sea Conference and the BBNJ conference. The entire conversation is on YouTube. At the start of the IGC, many people asked me if we could do things the way the Third Conference did things. And I said, yes, indeed, you could. Please give up your cell phones. Please give up your tablets, your laptops, the internet, and please let us all of us get together for ten weeks at a time. Bring your paper, your pencils, and sit together in rooms for ten weeks. If you had given me the luxury of ten weeks at a time, the conference would have been organized a lot differently and that is how things have changed in the forty years since the Third Conference.

It is surreal to think that actually it has been less than a month since that night in New York, and I have not had the time to take stock or reflect. Maybe three years down the road if you ask me, my answer could be entirely different because at this point in time I have not had the benefit of hindsight. And maybe hindsight might change things.

Of course, central to what I was doing was the notion that if this is to work, we need to push as hard and as far as possible for a consensus outcome, and I certainly hope we can get there. We have consensus on sending the text for technical editing.

Formal adoption will come subsequently. We are targeting June. And really I am so glad that you can see the video here of the ocean because it reminds us of why we are doing it.

In terms of the organization of work, I wish to highlight two aspects, which are the utilization of small working groups as well as the president's consultations. But to some extent, I will say that the organization of the work was already set in place for us before we began the IGC and there were two reasons for it.

First, the mandate of the IGC, which was in General Assembly Resolution 72/249, set out the four elements that would form the core of the package, namely: marine genetic resources and the sharing of benefits; area-based management tools, including marine protected areas; environmental impact assessment; and capacity building and transfer of marine technology.

Before we had the IGC, we had the preparatory committee or Prep Com, which was divided into four informal working groups, one on each element. We decided to add a fifth working group on what we call cross-cutting issues that would cover the preamble, the general provisions, the institutional arrangements, implementation and compliance, dispute settlement, and final clauses.

In a sense, that organization was already set for us, and I wanted that continuity from the Prep Com into the IGC because I did not want us to rehash old ground by reorganizing in different ways. By choosing a format that was already familiar to the delegations, it allowed us to pick up from the Prep Com and move forward.

We worked on the basis of informal working groups until we came to the third session where we started with parallel tracks, and then we introduced the notion of small working groups in the fifth session. My thinking about small working groups was to get a small group of delegations together, five or six of the most interested delegations to sit out and hammer specific parts of the text. We would not assign the small working groups ten provisions and say, "you go work on it." But they were very specific, such as, "deal with this paragraph, settle it and work it out and come back and report to us." The small working groups were to some extent self-selecting. The facilitators could say "you get together and sort this out." But others were free to join, and that was because I did not want us to have a long debate about why specific countries would be in the small working group. Because that would have soaked up very precious negotiating time. I had in mind a particular vision of how the small working groups would operate.

But the execution maybe did not go as smoothly. Many concerns were raised. In the interval between the first and the second part of the fifth session I reviewed and reflected on those concerns and we put in place certain measures to limit the number of small working groups, to be clear about the mandate of the small working groups, to be clear about the facilitator of the small working group, where they would meet, what time they would meet, so that there was greater clarity around the process.

That said, to a certain extent, that chaos in the first part created a sense of urgency that moved people along to the point of having president's consultations open to all delegations except observers.

The consultations were in a closed-door format intended to give a safe space for delegations to have very frank conversations across the table in a smaller room where they could face each other and negotiate. And of course it was the president's consultations that lasted through the Friday and the Saturday, of which you have read.

So those were two aspects of it. Will that work in another context? It depends on the process and the issues that are being discussed. Every process of negotiating a treaty is very unique. It depends on the dynamics of those processes as well.

But I wanted to very quickly move into the preparation of the draft text. I had in mind two particular objectives. The first objective, of course, was to indicate or to reflect the progress or non-progress, as the case may be, on the issues. And, you know, at one point I opened for proposals and we collected about 800 pages of proposals. Believe me when I say it took quite some time for me to work my way through each and every one of those proposals, but it was to get a sense of where the room was at that point in time.

The other aspect was really about wanting to generate discussion, but also negotiations. So in the early draft that was prepared for the third session, you will see, for example, in the MGR section that, because we were discussing exclusions of fish and fish as a commodity, it was a deliberate choice to propose the alternative that "[t]he provisions of this [Part] or [Agreement] does not apply to fish and fish as a commodity." And that was really to drive delegations to think exactly what is the scope of the exclusion that we were drafting. So throughout the text I put in some specific notions to be able to drive delegations to think about it.

Then for the text, for the fifth session I was very deliberate in stripping the text of options because I wanted all delegations to negotiate on the basis of one text because if you had options, you would get delegations probably saying, "I want option one. Or I prefer option three." So instead of negotiating, they would plant themselves on specific options.

I merged and redrafted the text so that there was one text that everybody had to engage on. There were a few provisions with options, and that was to signal that those provisions would probably be the core of the package that we were developing. I have not had time to take stock and look back to see how accurate my guesses were.

But I think there were some overlaps between those provisions with options and what was in the final package. And I know I have exhausted my time, so I am going to say thank you very much to everyone. I am happy to take questions later. Thank you.

Enrico Milano

Thank you very much, Rena.

Now we move on to Lucia Solano and to the more substantive discussion. With Lucia we have identified a number of issues that are not certainly simple ones.

They have a certain degree of complexity, both from a political and diplomatic point of view, but also from a legal point of view and of course there are issues that have consumed much of the time of negotiation. Some of these were really solved at the very last minute.

Lucia, maybe you could tell us a bit more on the dialectics and the dichotomy that played out in the negotiations between the common heritage of humankind, as it is called now, and not anymore common heritage of mankind, on the one hand, and, on the other hand, the freedoms of the high seas.

That is the first issue I would like you to address for us today. And the other one is the relationship between UNCLOS as an implementing agreement, which of course was the key issue for delegations like yours, representing a State that is not a party to the Convention, and yet had the desire and appetite to become a party to the BBNJ agreement.

Remarks by Lucia Solano*

Thank you so much Enrico, and good afternoon to all of you. It is an honor for me to be here today. I did my LL.M. here in Washington D.C., and I graduated eighteen years ago and the first time I came to ASIL was then, as a student. I cannot believe I am on this side now. So thank you for having me.

Thank you also to Massimo for organizing this panel. I think this agreement is a major achievement for the UN, and I would like to thank President Rena for leading us. This is indeed a major accomplishment for international law, for multilateralism, and we should all be very proud of it.

I ended up participating in the first IGC because Colombia is not a party to UNCLOS. So we wanted to see if the agreement was going to have an effect on us. And also and particularly because the treaty has had two tracks since the beginning, or at least that is how I see it: one track is very much law of the sea, but the other one is environmental law, and Colombia is very active on both fields.

So we said "we have to be there even if we are not party to the Convention." And also because the resolution convening the conferences calls the agreement "an implementing agreement" or "an agreement under the Convention." So we wanted to be there, see what that meant, and have our rights as a non-party to UNCLOS preserved. On this, when I get to the second part of your question, I will refer to the relationship of BBNJ with the Convention and whether the agreement really stuck to what the Convention says, i.e., if it stays "within its framework," or whether it went further.

But on the first part of your question on the dichotomy, or at least that discussion between the principle of common heritage of mankind (then) or humankind (now) and the tension with the freedoms of the high seas, that was an issue that was always there as background to the discussions, but it was not really tackled until the very last IGCs, that is in IGC5 and IGC5*bis* (also known as IGC5+).

The room was quite split. The G-77 + China, a negotiating group that represents 134 states from the Global South, was very active in defending the common heritage of mankind because the way we saw it, from developing states' perspective, that is and has always been the principle that allows states to get there, to the areas beyond national jurisdiction, and to carry out all the activities that need to be carried out in those waters.

* Permanent Mission of Colombia to the United Nations.

The opposite view, which was coming from developed states, was that we can get to those areas of the seas because we have the freedoms of the high seas, and specifically the freedom of scientific research. Thus, those waters are really nobody's. Our view from the G-77 was that those waters are everybody's, i.e., those waters are in our view clearly the "common heritage of humankind."

We considered, therefore, that such a principle needed to be reflected in the text. We believed, first, that Common Heritage of Humankind is a principle. Second, we believe it is actually the principle that allowed us to engage in the negotiations to begin with, but it was always there and it was in the text since the beginning. We had to make sure we could keep it in. The negotiations on this principle became then quite fraught, and it was everybody saying what they believed, trying to convince the other side, and playing a numbers game.

You had all 134 States from the G-77 saying "we think this is a principle that governs activities in maritime areas beyond national jurisdiction." And we had the other side saying "no, no, it is not. What applies are the freedoms of the high seas." The discussion was going nowhere.

I think that until the very last day of IGC5+, we decided "ok, we are not going to convince each other; nobody is going to win this discussion. We really have to move forward." Both sides were concerned about how to solve the dichotomy.

There were all sorts of proposals coming from all sides of the room. In the end, we reached a language that gives everybody comfort. It is quite a successful thing, because I think everybody is happy with the result. I know we are happy.

Now the text of the treaty refers to both concepts, in Article 7, related to the general principles and approaches that govern the treaty. Each and every word and every comma in that Article means everything. I am going to read it out for you to know, so you can understand how this was solved. It reads as follows:

> Article 7
> General principles and approaches
> In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches:
> …
> (b) The principle of the common heritage of humankind which is set out in the Convention;
> I The freedom of marine scientific research, together with other freedoms of the high seas;
> ….

As you can see, letter (b) says "the principle of common heritage of humankind, which is set out in the Convention," and that was the main issue. Whether it was just how as it is set out in the Convention or if this principle goes beyond what is in the Convention.

We decided to go with this language and everybody was pleased. It was the very last thing that we had to decide and it was tough. As soon as that was decided, that was it, that was the moment when we went over the text, finished cleaning it up and like an hour later we had a final text.

It was really the key issue. There is going to be a lot of discussions around it, but we did solve a major dichotomy between developing and developed states.

Then the second part of your question, Enrico, refers to the relationship of the BBNJ agreement with the Convention. That is perhaps a subject that will require more interpretation because the main thing is that since the beginning we were talking about an agreement under the Convention, and that is obviously very important for states parties to UNCLOS.

But for states like mine that are not parties to the Convention, there was a discussion about whether the agreement was really going to be under the Convention or if it was going to exceed it or modify it, bearing in mind that even the name of the agreement already says it is "under the Convention," and that everybody refers to the agreement as an "implementing agreement to the Convention."

There were then some comparisons with the Fish Stocks Agreement (UNFSA). I think the two are completely different because the UNFSA is very specific. It has just a few provisions. BBNJ is a huge instrument. It creates a lot of institutions that are new to the system and are imported from international environmental law.

These components make it a very special treaty. The way I see it, the compromise to which states arrived is different in each chapter of the agreement. Obviously there is the general reference that this agreement has to be applied in accordance with the Convention, in no way can it contradict the Convention.

But there are specific chapters in which the text goes beyond what the Convention says. It elaborates on the Convention or develops the Convention. For me, the most telling chapter on this is the capacity building and transfer of marine technology chapter, which obviously for developing states was such an important chapter in many ways because it is the one that is going to allow us to be able to implement this agreement in the future.

Because we will not have the capacity sometimes or the technology. And, as you probably know, the capacity building and transfer of marine technology articles in the Convention, in Part XIV, are the least-implemented parts of the Convention in its history, which has not allowed developing states to really reach the level of developed states in any way.

It was always in the back of our minds, that we had to do better than UNCLOS, that we had to have a stronger language. I ended up negotiating that chapter on behalf of CLAM, which is a group of fifteen Latin American states.

The discussions were very much a discussion on "should we stick to the Convention? Should we go beyond?" We considered we had to go beyond because this has not worked in the past. We have to be wanting more and we certainly need this to be fully implemented, otherwise we will not be able to comply with the substantive provisions in the BBNJ agreement. It is as simple as that.

We arrived at language that is very good; in terms of capacity building it is very strong. We are very pleased with that because we were trying to ensure that developed states were going to contribute to building our capacities.

It is a little bit less strong on transfer of marine technology because the obligation to transfer such technology is obviously a harder obligation on developed states as some of that technology is not owned by states, but it is in the hands of private corporations. The end result is nonetheless still good, and certainly it is still better than what the Convention says. We are pleased with that too.

Then there are other provisions in the text that go beyond the Convention. For example, on Environmental Impact Assessments (EIAs), the Convention sets a standard for triggering the need to carry out an environmental impact assessment, and there was this tension between different standards contained in different legal instruments that already exist. In my opinion, the BBNJ text in the EIAs chapter ended up setting a better or higher standard than what the Convention has.

There is not such an important tension in the Area Based Management Tools (ABMTs) or Marine Genetic Resources (MGRs) chapters because those were topics that are not really well regulated in the Convention. They are all quite new with regard to the Convention.

In sum, there are areas in which we do not depart from the Convention, but we do go a bit further. I think that is an achievement for environmental law and for the law of the sea. That is our job as international lawyers: to think about the future generations and the future of the oceans and the marine environment and do better than we have done before.

I think we achieved a compromise that is, or should be, hopefully, a happy outcome for everybody.

Enrico Milano

Thank you so much, Lucia.

I now turn to my left, to Cymie, who is going to discuss more in depth what we see on the screen, the issue of environmental protection from her expertise as an international environmental lawyer. The main question that I would like to pose to Cymie is whether what we have agreed in New York just a month ago is a good basis for enhanced environmental protection of the oceans. More specifically, I would like you to address the relationship between the part of the agreement on environmental impact assessment and the part on area-based management tools and marine protected areas.

Remarks by Cymie Payne*

Thank you Enrico, and thank you to the organizers for the invitation and to the Schmidt Ocean Institute for providing the beautiful video of deep sea life as our background—the biodiversity that we are discussing today. It is an honor to be on the same podium with the President of the negotiation and the Legal Advisor to the Mission of Colombia to the United Nations, and to be here with colleagues at the ASIL Annual Meeting. I was asked to offer my reflections on the key contributions of the BBNJ Agreement, and to briefly explain the process that the Agreement provides to establish marine protected areas in areas beyond national jurisdiction.

We are facing a triple planetary crisis: climate change, pollution, and loss of biodiversity. The marine environment potentially provides 95 percent of the habitable space for life on Earth and is rich in diverse life forms. The BBNJ Agreement seeks to address conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction by establishing institutions, processes, and obligations that will allow states, users of the ocean, and the international community to cooperate and to manage human activities in ways that protect and preserve the marine environment and achieve equity. It implements provisions in UNCLOS.

The BBNJ Agreement provides a process to establish marine protected areas in areas beyond national jurisdiction, as well as other area-based management tools. This creates a pathway to achieving the goal of 30 percent protected areas by 2030 (the so-called 30×30 goal) for the world ocean that did not exist before. High seas marine protected areas have been established so far only in very limited areas in Antarctica, the Northeast Atlantic, and the Mediterranean.

The BBNJ Agreement also strengthens assessment and management of human activities through environmental impact assessment. It contributes to increased capacity for developing states to participate in treaty activities, and provides for equitable sharing of benefits of ocean biodiversity from the development of useful products from marine genetic resources.

As you have already heard, the conservation strategy here is to create new institutions and processes that allow states to better cooperate for good ocean management. UNCLOS did not create a conference of the parties such as we are used to seeing with the climate change regime; that limited states' abilities to operationalize obligations in the Convention. The BBNJ Agreement will do this with a Conference of the Parties, a Secretariat, a Scientific and Technical Body, and Capacity Building, Implementation and Compliance, and Finance Committees, as well as a Clearing-House Mechanism for publication and sharing of information.

* Rutgers University.

In this area of international law, access to the best scientific information is essential. This statement from the Woods Hole Oceanographic Institute helps to explain why the 1982 Law of the Sea Convention did not provide more detailed provisions for biodiversity protection:

> Most of the major discoveries in oceanography have occurred only within the last 50 years … hydrothermal vents on mid-ocean ridge crests, which support previously unimagined ecosystems and exotic communities of life. Heat from the Earth's interior, rather than the sun, supports these life forms.

At the time the Law the Sea Convention was negotiated, we had little idea that extraordinary diversity of life forms occurred in the deep ocean; it was believed that life hardly existed beyond the sunlight zone. Today, we still must manage human activities without the information about ocean populations and habitats that we have for other ecosystems. For example, we do not have population studies for most of these species, and our records of the species that we have observed are based on one or two individuals.

The negotiators of the BBNJ Agreement were aware and took into account the science that tells us that life in the high seas is complex, diverse, abundant, and at risk. Scientists were involved in the process of negotiation during its early stages through side events that were often held between the morning and afternoon negotiating sessions, frequently organized by civil society observers.

The UNCLOS negotiators were sufficiently aware that the marine environment was both valuable and vulnerable that they provided framework guidance for protection of the marine environment, to be implemented in subsequent treaties such as the BBNJ Agreement. For example, under Article 192 of UNCLOS, states have a general obligation to protect and preserve the marine environment. More specifically, UNCLOS includes monitoring assessment and reporting requirements. Article 206 states:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments [to the competent international organizations, which should make them available to all States.]

UNCLOS also directs states to cooperate on a global and regional basis and to provide scientific and technical assistance to developing states. These obligations are captured in the BBNJ Agreement as well.

The BBNJ Agreement implements UNCLOS conservation obligations with the two tools that I mentioned earlier: building resilience by providing management tools that limit human activities in some areas, including marine protected areas, in its Part III; and encouraging prevention, mitigation, and control of pollution and other harmful activities by requiring environmental impact assessment in its Part IV. It also facilitates large scale planning of human activities by authorizing use of Strategic Environmental Assessment.

The BBNJ Agreement acknowledges the synergy between climate change and biodiversity loss. In the Principles and Approaches section, it is noted that:

> States shall be guided by an approach that builds ecosystems resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the ocean's role in climate.

The BBNJ Agreement also recalls the important principle found in Article 195 of the Convention, requiring "the non-transfer of damage or hazards from one area to another, and the non-

transformation of one type of pollution to another." This is a reminder that climate change solutions should not be implemented at the cost of harm to biological diversity.

UNCLOS emphasizes cooperation and collaboration between users of the ocean. The BBNJ Agreement advances and operationalizes that approach through specific measures provided in the section "Measures such as area-based management tools, including marine protected areas" intended to establish a connected network of high seas marine protected areas. A state or a group of states will submit a proposal for a marine protected area. Specific information that must be in the proposal includes: identification of the area to be protected, the threats it faces, and a draft management plan. During a consultation process, stakeholders will have an opportunity to review and comment on the proposal. The proponents will be able to revise the proposal based on input received during the consultation process. The BBNJ Agreement's Scientific and Technical Body then will review and assess the proposal and will provide a recommendation to the decision-making body, which is the Conference of the Parties. The Conference of the Parties will decide whether or not to establish the marine protected area. The text also provides guidelines for implementation, monitoring and review of the marine protected areas that are established.

The environmental impact assessment provisions require that States conduct environmental impact assessment for unregulated and new activities in areas beyond national jurisdiction, and that assessments prepared under other legal regimes be reported through the Clearing-house Mechanism. The principles of transparency and access to information by stakeholders are reflected in these provisions.

I come back to the title, "Reaching Beyond the Limits of National Jurisdiction", with the reminder that implementation of this kind of international law has to be through national law. We need to make sure that the capacity building measures are funded so that everybody can participate fully in the agreement. We hope for your support in the next steps, encouraging states to sign the BBNJ Agreement and to complete their domestic processes of acceptance or ratification so that it enters into force by 2025.

Thank you for your attention.

Enrico Milano

Many thanks, Cymie.

I open it for questions and comments from the audience.

Question from the Floor

Thank you very much. I am from Singapore Management University.

My question is about common heritage of mankind or humankind. It actually came from my undergraduate student. We know that common heritage of mankind was enshrined in UNCLOS, with regard to the deep-sea mining regime. Now it applies to BBNJ. Can we then say that it applies to the High Seas in general, including the water column? That at a moment when the Mining Code is being developed within the ISA. How does this work? I am still a little bit puzzled by this future application of the principle of common heritage of mankind.

Lucia Solano

Thank you so much. It is indeed *the* question. I agree with you that there is an issue with the way it is framed in the Convention and the way developing states saw it.

In our view, common heritage of humankind applies to everything. That was the purpose of pushing for its inclusion as a principle in the BBNJ instrument. But this came also from resolutions of the General Assembly that existed even before the Convention, and such resolutions already referred to the common heritage of mankind as a principle that applied to all areas of the seas.

But I am sure that the other side is going to disagree with that. Again, we did not expect to solve all the problems through the BBNJ text. We wanted to specifically refer to what is the answer to this question in the context of marine biological diversity in the areas beyond national jurisdiction. But what is going to happen, I think, is that we will have a court or tribunal decides on this in he future and we know what we are going to say and we probably know what the other party is going to say.

From our interpretation, yes, it has always applied to all areas. It will continue to apply. In the BBNJ text we were very intentional on having this specific reference to the areas beyond national jurisdiction because otherwise we would not have reached an agreement.

The way it is drafted, it is in the context of BBNJ, but my opinion, and obviously that is what developing states will say in any court or tribunal, is that it applies to all areas of the sea.

Cymie Payne

This is where I really enjoy being able to be an academic and say that there is a wonderful article by Dire Tladi on common heritage that points out that it is not all rights, it is also duties.[1] He describes a much more elaborated view of what common heritage can mean. I would love to see common heritage of humankind evolve into that. And be more focused on, let us say, a more generous view of common heritage of humankind all around.

Rena Lee

At the beginning of the February session, I told all the negotiators we are not going for perfection because it is our duty to give generations of law students and law academics fodder for their journal articles, so, I invite you to write on this. Thank you.

Questions from the Floor

Hi, I am Eva from University of Tromso in Northern Norway and I was wondering if you can elaborate a little bit about the interplay between a marine protected area when they are being established and a regional fisheries management organizations and especially the obligations of States Parties to the BBNJ agreement that are also a member of an RFMO that might have competence in the area, and would that imply that their obligations should be greened a little bit? Thank you.

I am Eran Sthoeger, I am a practitioner. As a litigator I am wondering if you could say more about the dispute settlement clause, especially perhaps for Lucia. How does that work? If you were a party to the BBNJ, but not a party to UNCLOS. Thank you.

Lucia Solano

Thank you so much for the questions. Those are *the* questions.

So with regard to the interplay between ABMTs and states that are parties to RFMOs, well that was the topic that did not allow for the ABMTs chapter to close early. But it was always tough and we kept discussing this back and forth because it was also a discussion that we had in the cross cutting issues chapter, but then the cross cutting issues team was saying "why don't you solve it in ABMTs" and the ABMTS team was saying "no, no, you solve it in cross cutting issues."

In the end, I think that the language is trying to solve all possible clashes. You can see this in Article 5, which is about the relationship of the BBNJ agreement with the Convention but also with the competencies of other regional and sectoral instruments and bodies. Paragraph two refers to that relationship with other instruments and bodies.

We came up with a language that was taken from the modalities resolution that says that the agreement does not undermine other relevant instruments or frameworks. We tried not to have competing competencies. That is how we saw the way forward.

On dispute settlement, you know better than I do. That was of major importance for Colombia, it was a key issue and we were thinking about it and how to try to come up with a solution.

In the end there were several proposals on what the dispute settlement mechanism was going to look like. Colombia was aiming for something beyond the *mutatis mutandis* approach. We thought it was unfit for this agreement to simply refer back to the Convention because BBNJ has its own specificities.

We were advocating for a mirror provision that would allow importing from the Convention to BBNJ the provisions specifically on choice of forum, and all of those provisions that were applicable, but also to have all complementing provisions that would refer specifically to the situation of BBNJ, and for example include a language to say explicitly that the dispute settlement mechanism would not apply or would not, in any way, solve issues about sovereignty or sovereign rights, which is not the area that BBNJ covers.

There were other proposals that, in different ways, departed completely from the Convention's approach. In the end, we have a provision that does import into BBNJ what we have in the Convention but that also allows states to choose freely the mechanism to solve their disputes. Then we have in addition to that an article on applicable law, which is a very beautiful article, but in practice it is going to be very difficult because there are going to be a lot of interplays between different applicable laws, instruments and frameworks.

In short you will have a lot of work to do in the future.

Enrico Milano

Thank you for dealing with those questions. Unfortunately we have to draw this to a close. It is thirty seconds to three o'clock. Let me thank all the speakers for their great contributions. And thanks also to the audience for the questions and the participation. I think they all deserve a big round of applause from us. Thank you.