



BBNJ and MGRs: Practical solutions for benefit sharing

By Natalie Y. Morris-Sharma

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Overview

- Background and context, including interests at play
- What does a “practical” solution mean
- A third way through on principle:
 - Common concern of humankind?
 - Part XIII of UNCLOS?
- Focussing on the modalities:
 - Monetary benefits sharing
 - Non-monetary benefits sharing



Background and context

► Science:

- Particular marine biological diversity in ABNJ shaped by the unique environment (temperature, pressure)
- Technological advancements unlocking the industry potential of MGRs (both access and application)

► Law:

- Diversity of legal regimes: (i) within UNCLOS; (ii) between UNCLOS and other existing instruments, e.g., CBD
- Within UNCLOS: CHM/Part XI or FHS/Part VII?



Interests at play: I

Development, economics and the global economic order

- Conservation and sustainable use / exploitation of MGRs
- Sharing of benefits from exploitation of MGRs, including capacity building
- Without removing incentives for investment in R&D
- The thinking is that developing countries would lose to rich developed countries, in any race for MGRs
 - Like in the 1960s, and Amb. Pardo's proposal to declare the Area and its resources CHM



Interests at play: II

Legal perspective, with practical implications

- Coherence with the existing UNCLOS regimes that apply to ABNJ: Part XI (The Area) and Part VII (High Seas)
- The risk is that pure and resolute adherence to either could result in functional incoherence
 - UNCLOS as “a network of spatial property rules”: physical location of resources as the point of departure for the applicable regime
 - Also presumes consumptive value, i.e., the value is realised when harvested; and the value is proportionate to the quantity harvested
 - These do not apply (easily) to MGRs



What would be a “practical solution”?

- ▶ Not an ideological one
- ▶ Taking into account the interests at play
- ▶ E.g., “avoiding a legal debate on whether MGRs fall under Part VII or under Part XI”.
 - EU and its Members States, in their written submission to the Chair of the BBNJ Prep Com in advance of the second session of the Prep Com



What would be a “practical solution”?

- Attempts to articulate a possible “middle-ground” approach have included:
 - A “mixed” system, where both the principle of CHM and the freedoms of the high seas would apply?
 - A “sui generis” regime, much like the EEZ regime?
- Others have called for a focus on the modalities of an access and benefits sharing regime
 - Focus not on the applicable principle, but on how a regime governing MGRs should work



A third way through on principle: The Common Concern of Humankind?

- A concept that features prominently in environmental law treaties
- Both CCH and CHM speak to intra-general equity and an inter-temporal element
- However:
 - There is no spatial aspect to CCH, whereas CHM usually involves the designation of spaces outside of sovereign territory
 - CCH does not speak to property elements, whereas CHM disallows appropriation and involves trusteeship (whether centralised or decentralised)



A third way through on principle: Part XIII of UNCLOS?

- MSR: a bridge across UNCLOS' different jurisdictional zones, since MSR can take place in the context of both Part VII and Part XI
- A new instrument “operationalising” Part XIII?
- There is no definition of MSR in UNCLOS; is bioprospecting a subset of MSR?
- Non-monetary aspects of a benefit sharing regime:
 - Information sharing and exchange – publication and dissemination of knowledge, scientific data, and information
 - Capacity building and transfer of technology



Focus on modalities: Monetary benefits sharing

- A benefits-sharing fund? Suggestions that have been made:
 - WHAT? With possible contributions from: e.g., mandatory contributions, advance payments, fees and royalties from utilisation of MGRs, quotas for permits, etc.
 - WHEN? Possibility of milestone payments, e.g., at point of filing of patents
 - BY WHO? By industry players
 - FOR WHO? With draw downs by: e.g., developing countries, specific allocation for SIDS
- Link to capacity building and transfer of marine technology also suggested, to incentivise private sector participation. However, this has been opposed.



Focus on modalities: Non-monetary benefits sharing I

- Clearing house mechanism?
 - A central repository
 - With different uses, including for the sharing of non-monetary benefits, e.g.,
 - access to information / results of research on MGRs
 - matching of needs to available resources and opportunities, for technological and scientific cooperation and training
- Featuring:
 - Information included in a timely fashion
 - Online accessibility
 - Possibly building on current mechanisms and best practices, e.g., connecting existing/regional databases, prescribing a standard format for information presentation



Focus on modalities: Non-monetary benefits sharing II

- But questions still remain:
 - How to fill the house: voluntarily or compulsorily?
 - What kind of data to be included: in situ, ex situ, in silico?
 - Who would have access to such data, and how would access be effected?
 - Funding?
 - Monitoring, review and follow-up?



Concluding remarks.