

Protecting deep seabed ecosystems under the future BBNJ Agreement and by the ISA; Perspectives of Government, Civil Society, Stakeholders, and Law and Science

Online Workshop, 13-15 December 2021; Session 1 – The ISA and the future BBNJ Agreement

Speaking notes of the presentation “Introduction to the BBNJ Process and the ISA” by Alex G. Oude Elferink

I am your moderator of Session 1 of the workshop, which is entitled ‘The ISA and the future Agreement on the Conservation and Sustainable Use of BBNJ’. Session 1 is intended, as I observed some moments ago, to provide a general introduction to the remainder of the workshop. In a moment, I am going to introduce our panelists to you and I will do so with great pleasure. We have a distinguished group of speakers, with a rich hands-on experience with international law-making and governance. No doubt, they will provide you with much food for thought and different perspectives. Before I will introduce our speakers, I will start with providing a brief general introduction to the BBNJ process and the ISA. Originally, Tom Diederer of the Legal Department of the Netherlands Ministry of Foreign Affairs was scheduled to give this general introduction. However, subsequently it transpired that Tom had to represent the Netherlands at the meetings of the ISA, which currently are taking place in Jamaica. Understandably, it would not have been feasible for him to combine his presence in Jamaica with an appearance at the workshop. It was with some trepidation that I agreed to replace Tom as the moderator of this session and provide a bird’s eye perspective on the BBNJ Agreement and the ISA. What can you really say about this complex topic in 10 to 15 minutes? But let me try. And let me start sharing my presentation with you. **[Title slide on]**

Tom was kind enough to share an earlier presentation on this topic, which I have in part used as a basis for this presentation. Let me add as a cautionary note that my presentation only reflects my views and should not be taken as representing the views of either Tom Diederer or the Netherlands Ministry of Foreign Affairs.

My talk is going to focus on the legal side of matters. And as we have a mixed audience today, it is good to start with the basics. A basic trait of the legal regime of the ocean as contained in the United Nations Convention on the Law of the Sea is the division of the ocean in zones with differing legal characteristics. An overarching distinction is between coastal State maritime zones, comprehensively referred to as areas within national jurisdiction or ANZJ, and areas beyond national jurisdiction or ABNJ, comprising the high seas and the international seabed area. The latter is also referred to as the Area, with a capital A. **[Slide 2 on]** On screen we have a representation of the spatial division of the ocean in ANZJ and ABNJ. Not completely up to date, but precise enough for current purposes. A couple of things may be

appreciated from this figure. First, ABNJ still cover a large part of the ocean, roughly half of it if you look at the surface area, and much more if you factor in volume. Second, ABNJ and AWNJ border on each other. Not only horizontally, but also vertically, the high seas watercolumn is superjacent to the continental shelf of coastal States beyond 200 nautical miles – in the slide the areas in dark blue and orange. Of less importance for our workshop, as we will be focusing on the Area, which is seaward of the continental shelf, but it does point to the complexity of negotiating a regime for ABNJ. An obvious question might be why not negotiate a regime for the sustainable use and conservation of all ocean space? The short answer would be, not everything is regulated satisfactorily in AWNJ, but coastal States are jealous of their rights and generally will resist attempts at international regulation. **[Slide 2 off]**

That leaves ABNJ. A number of factors contributed to the current negotiations of a future BBNJ Agreement. For starters, the term ABNJ is somewhat of a misnomer. Although these areas are beyond the national control of individual States as coastal States, individual States exercise control over their nationals in ABNJ. And that is exactly part of the problem. Uncoordinated activities in the high seas or the Area by individual States may lead to unsustainable use and favors those who have the technological capacity and economic clout to access these, from an anthropocentric perspective inhospitable, areas. Basically, this approach was reflected in the traditional freedom of the high seas. The UNCLOS to a certain extent addressed the inequity of this traditional high seas regime **[Slide 3 on]**. The exploitation of the mineral resources of the Area no longer is a free for all high seas freedom. The Area and its mineral resources are the common heritage of mankind, implying equity considerations, among others through benefit sharing. The Convention sets up the ISA as the body charged with developing a regulatory regime for mining of mineral resources and these resources may only be recovered under this regulatory regime. Article 145 of the Convention defines the environmental mandate of the ISA, albeit in general terms. And the competence of the ISA in this respect is limited to mining activities. A major innovation of the UNCLOS was its Part XII on the protection and preservation of the marine environment. In this case, there also is a lack of detail, for different reasons. An example are Part XII's provisions on environmental impact assessment. **[Slide 3 off]**

In the 1990s there was a growing awareness the Convention's regime for ABNJ contained regulatory and governance gaps. For instance, the Convention does not contain a regime specifically regulating the access to marine genetic resources. The Convention allows for the adoption of area-based management tools in relation to specific activities, but lacks a dedicated regime to designate and holistically manage marine protected areas. Finally, the Convention's regime on capacity building and transfer of technology – crucial for developing states to successfully participate in the

ocean regime – failed to deliver. All these factors converged in the process leading up to the current negotiations on the BBNJ Agreement.

Let's fast forward to the current state of the negotiations. **[Slide 4 on]** On screen you have the material scope of the negotiations as defined by the United Nations General Assembly in 2017. Four substantive issues - marine genetic resources; area-based management tools, including marine protected areas; environmental impact assessments; and capacity-building and the transfer of marine technology. These issues have to be treated as a package and a whole. In other words, there is no agreement on any specific issue unless there is agreement on the whole package of issues. **[Slide 5 on]** So, what is the actual state of play? The Covid-19 pandemic has had a enormous impact. Basically, it is very difficult or perhaps even impossible to meaningfully negotiate a multilateral agreement if in-person meetings cannot take place. **[Slide 6 on]**

What has been achieved thus far? The trust in president of the conference, Ambassador Rena Lee of Singapore, has been consolidated. The role of the president is critical to the success of a conference like this, in view of, for example, the responsibility for preparing draft negotiating texts. Skeptical delegations, who may not be convinced that there is a need for a BBNJ Agreement, have participated in a constructive manner. On substance, discussions are headed in the direction of negotiations and delegations have hinted where they might be willing to adjust their positions. Still, there has been no real progress on the big questions and it remains unclear what an acceptable package deal might look like **[Slide 7 on]** If we look ahead, it is clear that the conference will be moving to text-based negotiations. Delegations will have to determine how their positions translate to specific treaty language, how different options may be harmonized and what room there is for compromise. In that connection, it will also be needed to determine what red lines should not be passed. That goes for all delegations and may imply that certain choices eventually may be unacceptable to a minority. In other words, a balance has to be struck between ensuring global participation (inclusiveness) and making progress. It would seem to make little sense to agree on the lowest common denominator, if that does not promise to improve the current governance regime for ABNJ **[Slide 8 on]**.

Finally, let me briefly return to the ISA and its relationship to a future BBNJ Agreement. As the current draft of the Agreement indicates, it shall be applied in a manner that “does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies”. What that means remains somewhat unclear. One of our presenters, Wini Broadbelt, will be shedding further light on that question. Apart from that, if one asks the question “How will the BBNJ Agreement impact on the work of the ISA?” it is possible to distinguish between an

indirect impact and a direct impact. If the BBNJ Agreement results in higher environmental standards, these may impact on the work of the ISA, even if these standards are not directly binding on the ISA. Perhaps, such an effect is already taking place. One gets the impression that the ISA, like other organizations and bodies, feels that it has to demonstrate that it is up to fulfilling its environmental mandate. Consequently, there would be no need for the BBNJ Agreement to “fill in the gaps”. A direct effect could be better coordination between the ISA and other sectoral and regional bodies. The question remains who decides what specific measures should be adopted. Or rather, as all these bodies are made up of member States, which specific interests decide? The balance of interest in the ISA, representing mining interests, obviously is different from that of other stakeholders. Perhaps these concluding thoughts might be revisited during our discussions during these three days. [Slide 8 off]