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The Ocean Treaty's Novel Approach to Genetic Resources: A Response to Brad Sherman's 'Law in Non-Places'

Siva Thambisetty

This is a response to Professor Brad Sherman's comment on my article 'Unfree Commons: Freedom of Marine Scientific Research and the Status of Genetic Resources Beyond National Jurisdiction', published earlier this year where I unpack a central constitutionalising norm of the Biodiversity Beyond National Jurisdiction (BBNJ) Treaty. The Treaty will enter into force on 17 January 2026, and the first Conference of the Parties will follow within one year of that date.

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Professor Brad Sherman's account succinctly situates the BBNJ Agreement within multiple institutional and normative trajectories, all of which are marked by one central, inescapable shortcoming—the persistent and profound failure to realise equitable benefit-sharing from the use of genetic resources in quantities that would justify the elaborate mechanisms set up to harvest benefits, or indeed reflect the use of genetic resources in science and technology and commercial applications globally. For example, an agreement on Rooibos tea that took years to materialise led in 2019 to USD 800,000 being transferred from worldwide sales to Indigenous communities.[1] In 2019 not a single instance of monetary benefit sharing from DSI was recorded by a global fact-finding study.[2] Months after the Cali Fund was set up not a single payment has gone into this global multilateral mechanism.[3] These meagre wins cannot all be attributed solely to the failings of a property-based system. The effects of these failures are largely borne by developing countries.

If the ills of current systems lie in the property roots of benefit-sharing modalities then the move away from the property underpinnings is to be applauded. However, oddities such as the failure to define genetic resources in scientifically accurate ways that recognises that biological samples and genetic information, while distinct, are linked entities; or the dysfunction arising from sovereign ownership of biological samples and private rights over genetic information even though they are linked in this way, and the existence of both bilateral and multilateral mechanisms, all suggest that the reasons for failure of benefit-sharing are altogether more complex. So, while Professor Sherman is right to use my paper to diagnose the ills of the access and benefit-sharing framework, and ask whether the BBNJ agreement can be expected to do things differently, his prognosis is at odds with my arguments that we are at a pivotal and more hopeful moment now than ever before in how we govern genetic resources.[4]

The tethered approach that I present to make sense of the BBNJ Agreement is neither a full property-based approach nor is it based on an absence of property. It qualifies the property status of genetic resources beyond national jurisdiction as one marked by the freedom of marine scientific research. The core of my argument is a post hoc explanation of the regulatory bargain at the heart of the Treaty mechanism that flows from existing framings in UNCLOS rather than a plea to move closer to property-based systems.

Secondly, I do not share his optimistic view of what a move away from property-based systems would bring for digital sequence information. The default would be a kind of genomic commons—underpinned by a view that genomic information unbound by property-based obligations will equally benefit all. In reality, vast differences in access, capacity and wealth means that the genomic commons housed in digital form and in biological repositories is currently more available to some than others. Technical capacity exercised by scientists in well-funded environments becomes a precursor to commercial exploitation,[5] the benefits of which are distributed in skewed ways.

Thirdly, perhaps a more fundamental disagreement arises from an insight I under-develop in the original paper. Developing countries do not rely on the property status for genetic resources under the Convention on Biological Diversity solely because they think it will lead to monetary gains but because property is a multi-faceted relational thing. In global biodiversity governance, it surfaces as a short-hand for a messy set of nested relationships. It includes a way to represent Indigenous Peoples and Local Communities living within contracting parties' sovereign territory, it carries the weight of a dignity-based approach to retrieving power from a colonial ravaging of natural resources, it gives leverage during treaty negotiations, and it holds out the promise of benefit-sharing where there may be none. These rich and varied functions of property are often on full display during intergovernmental negotiations. The legal treatment of samples and information in the BBNJ agreement I believe centralises a relational view of the resource, starting with the link between biological samples and intangible genetic information; and the relationship

between scientists exercising a freedom of marine scientific research and the resources of the ‘non-place’.

Professor Sherman makes much of ‘decoupling’ but what is it? Decoupling is often presented as a natural progression from the move from physical samples to digital sequence information. But that is based on a strategic fallacy that genetic sequence information cannot be traced to physical samples. Decoupling, I would argue is not a legal norm, rather it is a political strategy that breaks the link with genetic resources because that link represents liability, jurisdiction and obligation to share benefits. De-linking samples from information also negates crucial meta data that makes the samples less useful for science. The BBNJ calls this bluff by recognising for the first time in a legally binding treaty that materials and samples are distinct but linked entities. The BBNJ treaty links genetic resources and sequence information using the ‘BBNJ Standardised Batch Identifier’ (Art 12). In that sense use of an identifier is recognition of the terms of use of material and sequences marked by that identifier.

While decoupling itself will not lead to benefit sharing, it removes contorted bases for claims. Scientists who use digital sequence information have benefited from the years it has taken the law to catch up and acknowledge that genetic resources are linked to digital sequence information. Final acceptance of this as a legal norm reflects progress, and some vindication of the years and considerable negotiating resources it has taken to get here.

Unlike what Professor Sherman suggests, the BBNJ does not represent a decoupling from access, use and benefit sharing. There is decoupling only in the sense of individual instances of access—which is replaced with aggregate usage—reflected in a tiered fee (Art 14(7)) and in the biennial reporting (Art 12) that databases have to do on aggregate access using the batch identifier. And there is definitely no decoupling from benefit sharing in the BBNJ—it is decoupling from individual ‘users’ who benefit from digital sequence information and marine genetic resources. And that is because the obligations to share benefits fall on State parties not individual users. Interestingly therefore while states do not begin with sovereignty in the legal non-place of the high seas, they end up with sovereign interest in the rules that contracting parties will have agreed to. So even in cases where there is decoupling, sovereign interests of contracting parties will have to ensure that the system remains functional and monetary obligations are met.

And finally, when Professor Sherman uses the term non-place[6] in conjunction with referring to the common benefit of mankind as a ‘fiction’ he pushes the BBNJ to the periphery of the global governance of genetic resources. I would argue that the opposite is true—the high seas are not an anonymous or transient space—they require a great deal of intentionality on the part of marine scientists to engage with. While their presence in such non-places of the high seas may be temporary, the outcomes of such presence is anything but, given the potential benefits of such visits. Common heritage of humankind (Art 7) is a framing that directs specific modalities, and allows a decision maker both to assess before, and check after, whether certain

conditions are being met. The fact that it is a norm in a legally binding treaty that also gives legal life to ‘digital sequence information’ for the first time is of critical significance.

And finally, does the BBNJ implement an ‘incredibly fragile’ system? Most of Part II of the agreement will be implemented centrally or through coordination with non-state entities like databases and under the direction of an unprecedented access and benefit sharing committee that is specific to this Part (Art 15). The batch identifier will trigger a cascade of operative provisions relevant to multiple information domains where genetic resources are positioned or reside—including databases that hold digital sequence information, biological repositories, patent databases and publishers and those who make use of them. In that sense the BBNJ marks a departure from the bricks and mortar world to the world of information and aggregate data.[7]

In seeing this exciting new framework as simply a move away from property-based systems rather than a rich relational approach to resources squarely highlights what I have come to believe is the greatest challenge in biodiversity governance, and one that Professor Sherman’s historically informed analysis also settles on—the most challenging threat to institutional innovation in biodiversity governance is that our legal imagination remains stuck in ways that have demonstrably failed us.

References

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[2] M A Bagley and others, ‘Fact-Finding Study on How Domestic Measures Address Benefit-Sharing Arising from Commercial and Non-Commercial Use of Digital Sequence Information on Genetic Resources and Address the Use of Digital Sequence Information on Genetic Resources for Research and Development’ CBD/DSI/AHTEG/2020/1/5 (2019) (as requested by decision 14/20 (paragraph 11(e)) from the Fourteenth Conference 12 of the Parties to the Convention on Biological Diversity).

[3] O Dwyer, ‘Revealed: Cali Fund for Nature Still Empty as Emails Show Industry Hesitation’ (6 August 2025) <https://www.carbonbrief.org/revealed-cali-fund-for-nature-still-empty-as-emails-show-industry-hesitation/>

[4] There are several signs of increased ambition and institutional innovation in biodiversity governance globally. F Rabitz and others, ‘A Turning Point in Global Biodiversity Governance’ (2025) 34 Environmental Politics doi: 10.1080/09644016.2025.2565867.

[5] S Sturdy, ‘The Commercial Roots of the Genomic Commons’ (2025) 55(5) Social Studies of Science 655.

[6] M Auge, *Non-Places: An Introduction to the Anthropology of Super Modernity* (Verso 2009).

[7] Work on how the technical specification of the identifier will fulfil these legal and policy functions has already begin. S Thambisetty, M Rabone and P Oldham, 'From Paper to Practice: Operationalising the Standardised BBNJ Batch Identifier' (August 2025) <https://www.researchgate.net/publication/394744165_Operationalising_the_BBNJ_Standardised_Batch_Identifier>.

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