



The High Seas Biodiversity Treaty

An Introduction to the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

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IUCN, the International Union for Conservation of Nature, through its Members and Commissions, called for High Seas protection in its resolutions adopted as early as 2000 and actively contributed through providing independent scientific and legal technical advice throughout the negotiation process of the BBNJ Agreement. The IUCN would particularly like to thank the IUCN World Commission on Environmental Law and the IUCN World Commission on Protected Areas, as well as the whole IUCN delegation who participated throughout the Intergovernmental conferences (IGCs).

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Abbreviations

ABNJ:	Areas beyond national jurisdiction
ABMT:	Area-based management tools
ABSC:	Access and benefit sharing committee
BBNJ Agreement:	International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction
CBTMT:	Capacity-building and the transfer of marine technology
CBTMTC:	Capacity-building and the transfer of marine technology committee
CHM:	Clearing-House Mechanism
CoP:	Conference of the Parties
DSI:	Digital sequence information
EIA:	Environmental impact assessment
IGC:	Intergovernmental Conference
IPLC:	Indigenous Peoples and local communities
ITLOS:	International Tribunal on the Law of the Sea
MGR:	Marine genetic resources
PrepCom:	Preparatory Committee
SPLOS:	Meeting of State Parties to the United Nations Convention on the Law of the Sea
STB:	Scientific and Technical Body
UNCLOS:	United Nations Convention on the Law of the Sea
UNGA:	General Assembly of the United Nations UNGA

Foreword



After almost two decades in the making, a third implementing Agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the [conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, also known as BBNJ](#), was formally adopted by consensus on 19 June 2023. It was subsequently opened for signature on 20 September 2023 during the 78th United Nations General Assembly. The significance of this undertaking cannot be overstated, marking a watershed moment in our collective commitment to safeguarding the health and vitality of our global ocean.

The BBNJ agreement symbolizes a triumph of international cooperation and is a testament to our shared responsibility for the well-being of our planet. It encapsulates a shared vision for a future where the biodiversity of our ocean is cherished, protected, and used sustainably for the benefit of present and future generations.

This monumental achievement aligns seamlessly with the adoption of the CBD Kunming-Montreal Global Biodiversity Framework in December 2022, presenting us with a unique opportunity to address the urgent need for preserving the essential functions that the ocean provides to humankind and all life on Earth.

A healthy, thriving, and productive ocean is fundamental for the survival of humankind. That vital function is now severely threatened, and we are at a juncture where tipping points could be reached. With the unprecedented climate change multi-stressors of warming, deoxygenation, acidification, and marine heatwaves that the ocean faces today, coupled with pollution and overfishing, it is high time for life in the high seas to be protected, conserved, and used in a sustainable manner.

The key task in front of the international community is to ensure the swift ratification of the High Seas Biodiversity Treaty. To ensure its entry into force, at least 60 States, but we should aim for universal ratification and effective and equitable implementation of the treaty. At this point countries need capacity-building support to develop the domestic processes to support rapid ratification and implementation of the treaty.

IUCN, the International Union for Conservation of Nature, has long been engaged in the BBNJ process and in High Seas conservation, producing extensive knowledge products to support the negotiations and lay the foundation for implementation of the future BBNJ Agreement. IUCN and its Commissions have provided independent legal and scientific expertise throughout the decades-long processes of BBNJ Treaty negotiations and, through its Members, IUCN has called for [High Seas protection in resolutions as far back as 2000](#).

Given its distinct position to influence and inform discussions, through its expert Commissions and large network of Members, IUCN is uniquely placed to play an important role in the implementation of the High Seas Biodiversity Treaty.

As we stand at the intersection of science, policy, and global governance, the imperative to address the challenges facing marine biodiversity beyond national jurisdiction has never been more urgent. It is with immense pleasure that I present this report, An introduction to the High Seas Treaty, on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

This report aims to provide an introduction to the BBNJ Agreement. The target audience is professionals from governments, civil society, private sector, and other stakeholders who know multilateral processes and treaties but are not “BBNJ experts”. It aims to be an easier read than the treaty itself, focusing on key provisions rather than all provisions. It places emphasis on “what will still be important to know for future implementation” rather than the negotiations process itself. It draws on IUCN’s insight into the history and direction of the negotiations, with a particular focus on what the different parts of the agreement were written to accomplish, the key provisions and how they work together, and what will be important considerations moving towards implementation, including suggested next steps.

It is my sincere hope that this report can help illuminate the complexities and opportunities inherent in the BBNJ Agreement, and its pursuit of conservation and sustainable use in these vast expanses of the ocean.

IUCN will continue to provide its expertise to support Parties in this next exciting era of ratification and implementation.

We must maintain the positive momentum for the Agreement’s adoption and work towards ratification and implementation as soon as possible for the vast, interconnected ecosystem that is our global ocean.



Dr Grethel Aguilar
Director General

IUCN, International Union for Conservation of Nature

A. Background

The International legal framework for the Ocean

The United Nations Convention on the Law of the Sea (UNCLOS), adopted by States in 1982, streamlined centuries of international customary practice and existing agreements into a new and comprehensive international legal framework. After entering into force in 1994 after the deposition of the 60th instrument of ratification, UNCLOS has now achieved almost universal acceptance (168 State Parties¹) and is often referred to as the “constitution of the oceans”, providing the primary legal framework, including for ocean conservation and sustainable use.

Balancing the rights and obligations of coastal States against the freedom of the seas

One of the major tensions underpinning UNCLOS’ negotiations was how to balance the rights and obligations of coastal States against the freedom of the seas, which was the predominant custom at the time. UNCLOS solved this by creating different zones for the water column (see **Figure 1**):

- The “Territorial Sea” which extends up to 12 nautical miles from shore and in which coastal States have full sovereignty;
- The “Contiguous Zone”, which extends up to 24 nautical miles and acts as a buffer zone in which the coastal State has limited enforcement authority to

prevent infringements in its territorial zone;

- The “Exclusive Economic Zone”, which can extend up to 200 nautical miles and in which coastal States do not have full sovereignty, but have sovereign rights and jurisdiction for the exploitation, conservation and management of marine resources; and
- The “High Seas” which encompass any part of the sea that does not fall into any of the other zones and is therefore outside of the jurisdiction of any state.

For the seabed, subsoil and resources therein, UNCLOS established a similar zoning system (see Fig. 1):

- The “continental shelf”, which can extend beyond a State’s territorial sea and even Exclusive Economic Zone if it is naturally contiguous, and a State holds sovereign rights for exploration and exploitation of its resources; and
- The “Area”, which is “common heritage of [hu]mankind²” and in which activities related to seabed mineral resources shall be carried out for the benefit of humankind as a whole.

States have shown an interest to subsequently elaborate and expand on the provisions of UNCLOS, where necessary. In response to outstanding issues with regards to seabed mining, States adopted in 1994 the first implementing agreement under UNCLOS relating to the implementation of Part XI of the Convention, which entered into force in 1996.

1 As of May 2023, see https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

2 While UNCLOS uses “mankind”, Parties, when negotiating the BBNJ Agreement, took the opportunity to modernize the term to “humankind”, which is the term that will be consistently used in this analysis.

Similarly, the 1995 Fish Stocks Agreement³, UNCLOS second implementing agreement, which entered into force 2001, established a framework to operationalize the UNCLOS

obligation for States to cooperate in the conservation and management of shared fishery resources.

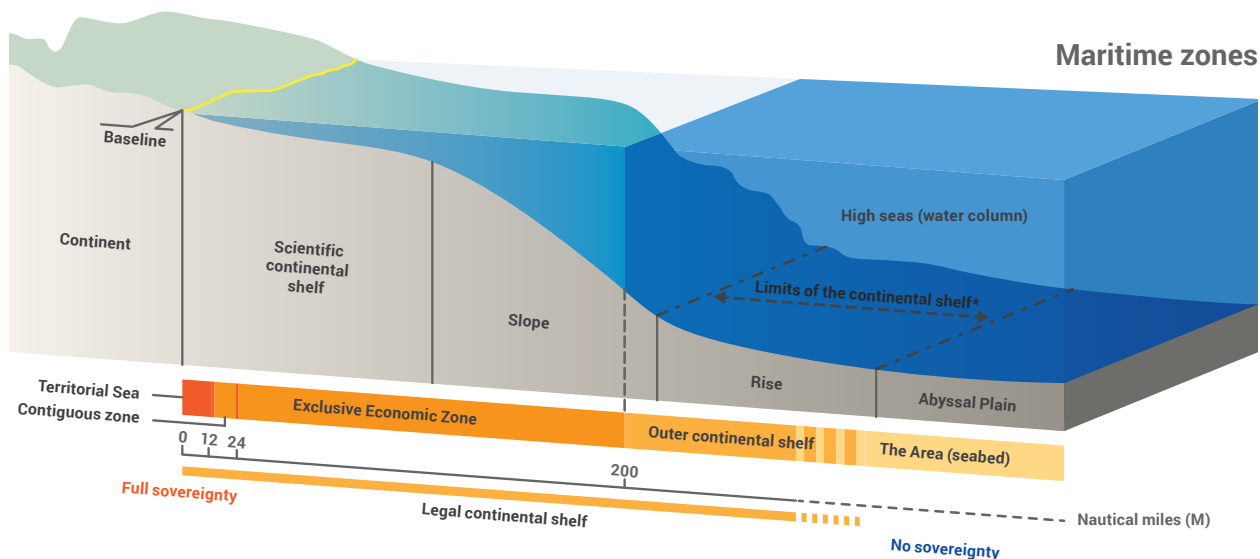


Figure 1: Maritime Zones established by UNCLOS. Both “The Area” and the “High Seas” fall under Areas Beyond National Jurisdiction. (*=The limits of the continental shelf extend to the outer edge of the continental margin or to a distance of 200 nautical miles from its baseline, with claims beyond 200nm needing to be confirmed by the Commission on the Limits of the Continental Shelf). Source for Figure: modified by the authors from original source, Riccardo Pravettoni, UNEP/GRID-Arendal, 2009.

The recognition of Biological Diversity

“Biological diversity”⁴ (short: “biodiversity”) only started to get more widespread attention after UNCLOS was adopted⁵ and its namesake, the Convention on Biological Diversity (CBD) was adopted in 1992. In the CBD text, States recognize the intrinsic (and economic) value of biodiversity, as well as its importance for maintaining living conditions for humankind and set the overarching objectives of the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. The CBD’s jurisdictional scope, unlike UNCLOS,

excludes biodiversity in areas beyond national jurisdiction – but covers activities and process under the jurisdiction or control of States anywhere, including in areas beyond national jurisdiction (ABNJ).

UNCLOS on the other hand does not explicitly address “biodiversity”, which contributed to a longstanding disagreement about whether or not MGRs from the Area would fall under the common heritage of [hu]mankind principle or Freedom of the High Seas⁶. UNCLOS provides some tools for environmental – and consequently biodiversity - conservation in areas beyond national jurisdiction, including a general obligation for States to protect and

³ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

⁴ The CBD defines “Biological diversity” as: *the variability among living organisms from all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.*

⁵ Sarkar, S. (2021) Origin of the Term Biodiversity BioScience, Volume 71, Issue 9, September 2021, Page 893, <https://doi.org/10.1093/biosci/biab071>

⁶ See e.g. Milicay, F. (2007) A Legal Regime for the Biodiversity of the Area; Schatz, V. (2022) “Crawling jurisdiction”: Revisiting the Scope and Significance of the Definition of Sedentary Species, Ocean Yearbook 36: 188-236

preserve the marine environment⁷, but it has been recognized that these general obligations are insufficient⁸. This gap in UNCLOS became all the more obvious as pressures on the ocean and the biodiversity it harbors multiplied since 1982⁹, while at the same time knowledge of the interdependency of humanity's life support systems with the ocean increased¹⁰.

The journey towards the BBNJ Agreement

Against that background, in 2004, the UN General Assembly established an "Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction"¹¹. At its fourth meeting in 2011, the working group agreed on a package of issues¹² that would form the basis of the later intergovernmental process to negotiate the BBNJ Agreement, namely: *the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole:*

- *marine genetic resources, including questions on the sharing of benefits;*
- *measures such as area-based management tools, including marine protected areas;*
- *environmental impact assessments; and*
- *capacity-building and the transfer of marine technology.*

The 2011 package, managed to capture the interests of different groups of States in a balanced manner and throughout the later negotiations process delegations expressed a strong desire to advance in lock-step across different parts of the Agreement in order to

maintain this balance. As is common for negotiations taking place at the United Nations Headquarters, States coordinated closely and jointly negotiated in the form of major groups (e.g. African Group, Caribbean Community (CARICOM), Core Latin American Group (CLAM), G77+China, Pacific Small Island Developing States (PSIDS)).

After additional meetings of the working group (2014-2015) and a Preparatory Committee (2016-2017) the UN General Assembly in 2017 decided to launch the negotiations for a third internationally legally binding instrument under UNCLOS¹³. The corresponding resolution foresaw four negotiation sessions (Intergovernmental conferences: IGCs) between 2018-2020. It also set out the modalities for the negotiations, including the possibility for the IGC to take decisions by vote when every effort in good faith to reach agreement on substantive matters by consensus has been exhausted. Acknowledging the existence of a patchwork of regional and sectoral bodies with mandates relevant to the conservation and sustainable use of marine biodiversity, the resolution also set out that a future BBNJ Agreement *should not undermine existing relevant legal instruments and relevant global, regional and sectoral bodies.*

While IGC1 (4-17 September 2018) did not yet consider a draft text, it already created informal working groups on each of the four elements of the 2011 package, a practice that would continue throughout the IGCs. The IGC President was also requested to develop a document, containing treaty language¹⁴ for consideration at IGC2 (25 March – 5 April 2019) and to facilitate progress towards a zero draft on the basis of those discussions. Starting at IGC3 (19-30 August 2019) States worked on the basis of draft texts prepared by the

7 UNCLOS, Art 192

8 See e.g. Mossop, J. (2018) Can we make the Oceans greener? The successes and failures of UNCLOS as an Environmental Treaty.

9 See e.g. Rogers, A, Laffoley, D. (2013) Introduction to the special issue: The global state of the ocean; interactions between stresses, impacts and some potential solutions. Synthesis papers from the International Programme on the State of the Ocean 2011 and 2012 workshops, Marine Pollution Bulletin

10 IPBES (2019) Global Assessment report on biodiversity and ecosystem services

11 A/RES/59/24

12 A/66/119

13 A/RES/72/249

14 A/CONF.232/2019/1

President of the IGC¹⁵, that already followed the structure of the BBNJ Agreement that was later adopted, including the four elements of the 2011 package plus general provisions and cross-cutting issues. IGC4 was originally scheduled for the first half of 2020, however the session had to be postponed due to the global Covid-19 pandemic and only took place 7 to 18 March 2022¹⁶, with significant restrictions to participation, in particular for civil society¹⁷.

During the long intersessional period (August 2019 to March 2022), delegations nevertheless continued to progress work towards the treaty in the form of a virtual intersessional work program organized by the President of the Conference. These intersessional work sessions did not result in an updated draft text prior to resuming the official negotiations. In parallel, many States also engaged in informal dialogues organized by the governments of Belgium, Costa Rica and Monaco in cooperation with the International Center for Dialogue and Peacebuilding, which helped keep the momentum alive. One of the challenges ahead of the newly scheduled IGC4 in 2022 was how to capture the progress made by some delegations in the intersessional period¹⁸ and it became clear during IGC4 that principal disagreements remained, requiring the General Assembly to schedule a fifth negotiation session (IGC5) for 15 to 26 August 2022.

This first session of IGC5 (IGC5.1), saw some progress, especially towards the latter half of

the negotiations, and achieved a breakthrough in the informal negotiations on the MGR part of the Agreement, which unlocked flexibility in other parts of the Agreement. As the IGC5.1 eventually ran out of time, the IGC President decided to suspend the negotiations and resume them at a later date yet to be confirmed. The resumed session of IGC5 (IGC5.2) took place from 20 February to 3 March 2023, where delegations agreed the text of the BBNJ Agreement in English, pending technical editing and translations into all official UN languages. This occurred after almost 36 hours non-stop negotiation from Friday 3 March to Saturday, 4 March 2023. This text, with largely minor technical and consistency-related edits, translated into all official UN languages, was then adopted by consensus on 19 June 2023 at the further resumed session of IGC5 (IGC5.3). Its Adoption was hailed as the most significant advance in international ocean law since the adoption of UNCLOS, and the most important accomplishment for multilateralism in decades, and for our climate since the Paris Agreement.

IUCN, the International Union for Conservation of Nature, through its Members and Commissions, called for High Seas protection in its resolutions adopted as early as 2000¹⁹ and actively contributed as an intergovernmental observer organization throughout the BBNJ process, including through legal commentaries on the draft text²⁰, targeted workshops²¹, as well as draft text proposals, technical briefings and publications²².

15 A/CONF.232/2019/6

16 A/DEC 74/543 and 75/570.

17 IISD/ENB (2022) Summary of the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction:-18 March 2022, Vol. 25 No. 225

18 High Seas Treaty Dialogues (2022) Informal Intersessional BBNJ High Seas Treaty Dialogues, IGC4 Non-Paper, March 2022

19 See e.g. IUCN Resolutions WCC 2000 RES 020 , WCC 2016 Res 050 and WCC 2020-Res 128

20 See e.g., IUCN, 2022, commentary on the further revised draft text of BBNJ (A/CONF.232/2022/5) 8 August 2022

21 E.g. 2022 IUCN/WCPA/WCEL Workshop: Untangling the BBNJ MGR Proposals

22 See [Laying the foundation for rapid, effective, and equitable implementation of the new High Seas Biodiversity Treaty - Story | IUCN](#)

This analysis provides an introduction to the newly adopted BBNJ Agreement for a wider audience, broadly following the structure of the text, but explaining provisions from other parts of the text where most relevant. It draws on IUCN's insight into the history and direction of travel of the negotiations, with a particular focus on:

- What are different parts of the Agreement written to accomplish?
- What are key provisions of the respective parts of the Agreement (and how do they work together?)
- What will be important considerations in moving towards implementation of these provisions?

B. Overview of the Agreement

1. Preamble and General provisions

Summary: What does it do?

The “Preamble” and “General provisions” sections of international treaties are fundamental components that set out the overarching context and general elements of the treaty. This includes definitions, principles and approaches that will be of overarching importance for the future interpretation of the treaty, in developing more specific guidance where necessary and contributing to overall coherence of the treaty.

Main elements

It is standard practice for international agreements to include **preambulatory paragraphs (PPs)**, which are not numbered and set out general considerations and the overarching context of the respective treaty²³, including references to relevant past agreements, as well as Parties²⁴ shared goals and aspirations. In practice it is not uncommon for States during the negotiation process to already put emphasis on different elements of the Agreement by what is included in the preambulatory paragraphs vs. the general principles and approaches in the operative part of the Agreement vs. what is not included at all.

Preamble

The preambulatory paragraphs of the BBNJ Agreement show the strong emphasis that

delegations put on the relationship between the new treaty and UNCLOS, and reiterate many relevant obligations under UNCLOS. It also makes reference to the 2007 UN Declaration on Rights of Indigenous People. In terms of “new” considerations in the preambulatory paragraphs, it is worth pointing out – although not surprising – that Parties recognize the threats faced by the marine environment (PP3), including the impacts of climate change, a first for the agreements under UNCLOS, and the need to address them through a global comprehensive regime (PP4). Parties also express their desire to act as “stewards” of the ocean in ABNJ, which had previously been proposed as a general principle and approach (“stewardship”) but was instead included in the preambulatory paragraphs. Several preambulatory paragraphs emphasize considerations of equity, the common interests and needs of humanity and the special circumstances of developing countries (PP5, PP6). The preamble also contains a paragraph acknowledging the importance of digital sequence information (DSI) of MGRs for research and innovation, that was added on the penultimate day of the text negotiations, adding emphasis to the importance of this consideration in other parts of the text.

General provisions

The General provisions contain articles with overarching applicability and impact on the overall Agreement and its future interpretation.

23 See e.g. UN editorial guidelines for resolutions.

24 The BBNJ Agreement’s definition of “Party” includes both States and Regional Economic Integration Organizations (Art 1.11). With regards to future implementation of the treaty, this analysis therefore uses the more inclusive terms “Party” and “Parties”.

They include what is meant by different terms (Article 1), the overall objective of the Agreement (Article 2), its scope of application (Article 3) and exceptions (Article 4), its relationship with other international agreements (Article 5), an assurance that the Agreement is without prejudice to sovereignty disputes (Article 6), the general principles and approaches to be used to guide Parties in the implementation and future interpretation and deliberations of elements of the agreement (Article 7) and an obligation for Parties to cooperate and promote the objectives of this Agreement (Article 8).

These provisions have received less attention from the general public than those in other parts of the Agreement, but almost all of them have significant impacts on the Agreement as a whole, as perhaps aptly reflected by the fact that the informal consultations on this part of the text were led by the President of the Conference herself, and that they contained the very last paragraph, under Article 7 (“General Principles and Approaches”), to be resolved in the negotiations.

Particularly noteworthy definitions will be discussed in the respective chapters.

The BBNJ Agreement’s objective is:

“(…) to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.”

which explicitly expands BBNJ beyond only the UNCLOS provisions, through “further international cooperation and coordination”. The Agreement’s scope is, unsurprisingly, areas beyond national jurisdiction. However, the

general provisions also specify that the BBNJ Agreement’s application is constrained:

- It does not apply to military vessels or any government vessels in non-commercial service (Article 4), with one noteworthy exception to the exception: the provisions of Part II (MGRs) do apply to government vessels in non-commercial service, because it would otherwise exclude governmental research vessels.
- *“It shall be interpreted and applied in a manner that does not undermine relevant [existing agreements] (Article 5.2)”*. While this provision carries the potential risk of significant limitations for the use of the BBNJ Agreement where other relevant agreements exist, it is unclear from the text what constitutes “undermining” and further guidance from the Conference of Parties and State Practice will help shape the implementation of this provision over time.

The not-undermine provision is also counter-balanced by the obligation of Parties to *“promote, as appropriate, the objectives of this Agreement when participating in decision-making under other relevant [agreements]”* (Article 8.2).

Overall, the inclusion of the principle of equity (see Article 7 d) and intergenerational equity (see Article 2 “for the present and in the long term”) are worth noting and align well with the broader consideration and incorporation of those in the negotiation process and the operational provisions themselves.

Key discussions and where they landed

The relationship between the BBNJ Agreement, UNCLOS²⁵ and other relevant agreements was consistently a major focus of negotiations, including in the general provisions. It is most

25 Initially there was some debate about the relationship of the BBNJ Agreement with UNCLOS, namely if it is an implementing agreement or more, i.e. goes beyond UNCLOS. See e.g. Payne, C. (2023) *The New High Seas Biodiversity Treaty Offers Conservation, Equity, and Regulatory Certainty*. ASIL Insights Volume 27, Issue 6. Article 2 states that the BBNJ Agreement represents an implementing agreement for the relevant provisions of UNCLOS and further international cooperation and coordination, Article 5 again sets out clearly that the Agreement shall be interpreted and applied in the context of and in a manner consistent with UNCLOS.

broadly addressed in the “not undermine” provision (Article 5), which, as stated above, has a potentially large impact on the future application of the BBNJ treaty and was thus subject to major disagreements. One option on the table was that BBNJ should not undermine the effectiveness of other relevant agreements, thus constraining BBNJ’s applicability only where existing agreements were already delivering. The opposing proposal was that BBNJ should not undermine the competencies of other relevant agreements, meaning that the existence of a mandate alone, even if not operationalized or implemented, would suffice to constrain BBNJ’s application. The general not-undermine clause in this part of the text contains neither of these formulations, leaving room for later interpretation and guidance by the Conference of the Parties (CoP)²⁶. Experience from other agreements shows there is considerable flexibility in States’ interpretation of such provisions over time²⁷ and it is too early to make definitive statements about what BBNJ will or will not be able to do. The obligation of Parties to promote the objectives of the BBNJ Agreement when taking decisions in other bodies they are Parties to, acts as an additional safety net to ensure the BBNJ Agreement’s objectives are still advanced, even where its application is constrained.

The most heavily negotiated part of the general provisions, and potentially the treaty as a whole, were however the General principles and approaches and, in particular if and how two of the key concepts of UNCLOS, Common Heritage of Humankind and Freedom of the High Seas, would be reflected. One option would have been not to reiterate either concept and give effect to them in the substantive provisions of the text, in particular Part II on MGRs. Many developing countries, against the backdrop of the slow operationalization of the Common Heritage of Humankind principle under UNCLOS and an

ongoing debate over which regime applied to MGRs in “The Area” (the part of the seabed not under the jurisdiction of any state),²⁸ attached great importance to re-iterating the Common Heritage of Humankind principle to guide negotiations and future interpretation of the BBNJ Agreement. Many developed countries in response wanted to re-iterate the “Freedom of the High Seas”, too. During tense last minute negotiations, States agreed to include:

(b) *The principle of the common heritage of humankind which is set out in the Convention;*

(c) *The freedom of marine scientific research, together with other freedoms of the high seas;*

with the emphasis on “freedom of marine scientific research” being much more consistent with how these principles are also reflected in the operational parts of the text, in particular Part II on MGRs.

Another major point of discussion was whether to include the “precautionary principle” or the “precautionary approach”. Both terms are interlinked and convey that where there is risk of harm to the environment, lack of scientific certainty shall not be used as an argument against the regulation of that risk. Comparing the two terms, the principle, as codified in the 1992 Rio Declaration (Principle 15, UNCED, 1992), is generally interpreted as stricter, while the “approach” (as outlined in Article 6 of the 1995 Fish Stocks Agreement) is more interpretive and takes into account the level of risk and countries’ capabilities. Negotiators were unable to resolve this disagreement and included :

(e) *“The precautionary principle or precautionary approach, as appropriate;*

26 For decision making on ABMTs, “respect the competencies of” was included alongside “not-undermine” (Article 22.2)

27 Kachelriess, D. Scanlon, J. (2022) CITES Growing Role in International Shark Conservation, <http://sdg.iisd.org/commentary/guest-articles/cites-growing-role-in-international-shark-conservation/>

28 Milicay, F. (2007) A Legal Regime for the Biodiversity of the Area

2. Marine Genetic Resources and sharing of benefits

Summary: What does it do?

At its heart, Part II of the BBNJ Agreement aims to balance fair and equitable benefit sharing of MGRs (including monetary benefit sharing) with as few burdens on marine scientific research as possible.

The ocean contains the highest functional biodiversity on earth, which is closely associated with and dependent upon underlying genetic diversity, namely the total number of genetic characters in the genetic makeup of each species²⁹. Most of the ocean's biodiversity, including genetic diversity, remains unstudied, but holds great scientific and economic opportunity. However, capacities to access and use MGRs are unequally distributed between States, as very few possess the necessary technology and research facilities to access their benefits³⁰.

Part II of the BBNJ Agreement sets out a new set of rules for how activities relating to MGRs, and their digital representation, digital sequence information (DSI), from Areas Beyond National Jurisdiction will be governed and how both monetary and non-monetary benefits from their use will be shared to further the objectives of this Agreement. Future Parties will have to ensure that actors under their jurisdiction, including vessels flying their flags, comply with the new regulations, which include among other things a notification system that establishes transparency and enables monitoring of these provisions along the different steps of the value chain. The MGR section relies heavily on institutions established in other parts of the Agreement, including the Clearing-House Mechanism (Art. 51) and the special fund

(Art 52.4) and establishes its own access and benefit-sharing committee (ABSC, Art. 15). As all parts of the Agreement, Part II applies to both the High Seas and the Area, settling the long discussion about what provisions would apply to MGRs in the Area.

Main elements

While the title of Part II is “Marine genetic resources, including the fair and equitable sharing of benefits” its provisions do not only cover MGRs, defined as:

“Marine genetic resources” means any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value. (Art.1.8)

but they generally also cover derivatives of living organisms in ABNJ and DSI on MGRs. Derivatives are included in the definition of “Utilization of marine genetic resources” (Art .14) through the link to “biotechnology” (Art.1.3). This is important as derivatives are currently often more profitable than MGRs themselves³¹. These definitions are broadly consistent with those used by the CBD and its Nagoya Protocol³². For DSI, negotiators followed CBD's precedent and did not include a definition³³. It is also important to note that by default, the provisions of the Agreement apply retroactively, i.e. to MGRs and DSI collected prior to its entry into force, unless a Party makes an exemption in writing. The provisions however do not apply to fishing activities or government vessels, unless living marine resources collected by them are later utilized as MGRs.

29 Blasiak, R. Wynberg, R. Grorud-Colver, K. Thambisetty, S. Bandarra, N.M., Canario, A.V.M. da Silva, J., Duarte, C.M. Jaspars, M., Rogers, A. Skink, K. (2020) The ocean genome and future prospects for conservation and equity

30 Blasiak, R. Jouffray, J-B., Wabnitz, C. C. C., Sundström, E. Österblom, H. (2018) Corporate control and global governance of marine genetic resources

31 Blasiak et al. (2020). The ocean genome and future prospects for conservation and equity. Nature Sustainability volume 3, pages 588–596 (2020)

32 IUCN Briefing for negotiators, Marine Genetic Resources, Part II, 2022. See <https://www.iucn.org/sites/default/files/2022-07/iucn-briefing-mgr-v2-final.pdf>

33 Thambisetty, S Oldham, P Chiarolla, C. (in press) Developing State Positions in the Making of the BBNJ Treaty: An Expert Briefing Document on Marine Genetic Resources

The objectives of Part II of the Agreement emphasize fair and equitable benefit-sharing, capacity building, especially for countries in special situations, marine scientific research and marine technology transfer, with the first three also clearly reflected in its operational paragraphs.

The treaty establishes an obligation for Parties to ensure that actors under their jurisdiction adhere to the rules set out within the Agreement. This includes a notification system that is triggered at different steps along the process (pre-cruise, post-cruise, utilization) and serves at a minimum two purposes:

- First, information shared through notifications constitute part of the non-monetary benefits shared in line with the Agreement, including for example opportunities for scientists, in particular from developing countries, to be involved in projects, and the physical or digital location where the resulting samples/sequence information will be stored; and
- Second, it establishes transparency over the implementation of the provisions and generates information that can inform future discussions of the CoP and the access and benefit-sharing committee, for example in the context of monetary benefit sharing by requiring that information about utilization and commercialization is submitted. Notifications are made to the CHM, which generates a batch identifier, i.e. a group identifier for samples from one collection event, attached to individual samples³⁴, facilitating monitoring of implementation. Repositories and databases will send aggregate reports on access to MGRs and DSI with the BBNJ batch identifier. The batch identifier as

well as the decision to not require prior approval (see CITES³⁵, ISA) balances the need for transparency vs. its impact on marine scientific research³⁶.

In addition to the information provided in the notifications, the extensive non-monetary benefits from activities involving MGRs and DSI from ABNJ to be shared include access to the samples and DSI themselves, transfer of marine technology, capacity building and increased technical and scientific cooperation.

The BBNJ monetary benefit-sharing provisions are separated into two phases:

- Initially, after the treaty enters into force, developed State Parties will share monetary benefits in the form of decoupled payments. Their level is not directly coupled to the value of commercialised MGRs and DSI from those countries, minimizing the burden of monitoring of related activities, but instead it will be based on the State Parties' assessed contributions to the BBNJ core budget³⁷. This has been referred to as "decoupled" payment system.
- The BBNJ CoP will then review and assess the monetary benefit sharing provisions every 2 years, with the first review scheduled no later than 5 years after the entry into force, and the CoP can then, taking into account recommendations by the access and benefit-sharing committee, decide on other modalities for the future. This may include changing the type of payments - for example milestone payments or payments of percentage of the revenue from sales of products are listed as options. These future modalities may

34 Oldham, P., Chiarolla, C., Thambisetty, S. (2023) Digital Sequence Information in the UN High Seas Treaty: Insights from the Global Biodiversity Framework-related Decisions, LSE Law School Policy Briefing 53/2023

35 Kachelriess, D. Cremers, K. Wright, G. (2021) Trading experiences: what can a global ocean treaty learn from a 1970s convention on wildlife trade? IDDRI Blog Post

36 Hartman Scholz, A. Lange, M. Habekost, P. Oldham, P. Cancio, I. Cochrane, G Freitag, J. (2021) Myth-busting the provider-user relationship for digital sequence information

37 Assessed contributions are annual payments by States (or Parties) into the regular budget of the UN or a UN treaty, which typically goes towards funding of key institutions, e.g. the Secretariat. How much each State has to pay follows a scale of contributions adopted by the General Assembly each year. See <https://www.un.org/en/ga/contributions/assessments.shtml>

also change which State Parties will have to share monetary benefits.

- Monetary benefits are paid into the “special fund” that will finance capacity building and implementation assistance activities, ensuring that all benefits shared from MGR related activities contribute to the objectives of the Agreement³⁸.

The text also establishes a special body, the access and benefit-sharing committee, to review the implementation and provide guidance on the MGR-related provisions of the Agreement. **Figure 2** provides an overview of the key processes and institutions under the MGR chapter.

Key discussions and where they landed

Provisions related to MGRs were among the final hurdles for an agreement on the BBNJ text and were subject of intense negotiations at the resumed fifth session of the intergovernmental conference in March 2023³⁹. Key disagreements included the following:

One type of living organisms in ABNJ is of course fish, and negotiators agreed early on that they wanted to avoid unwanted impact of the MGRs provisions on fishing activities, for example by subjecting them to the notification requirements. To resolve this, negotiators

excluded “fishing activities” and fish taken through fishing activities from the application of the Agreement, while clarifying that fish, where utilized as MGRs, would be covered.

While it was clear from the 2011 package onwards that the MGR provisions of the Agreement would include some form of benefit-sharing, the question of whether or not that would include monetary benefits was a major contention until the final days of the first part of IGC5 and even after that, the modalities remained subject to intense discussions. An initial compromise that unlocked a lot of goodwill was that monetary benefits shared under the BBNJ Agreement would only be used for capacity building and advancement of the objectives of the treaty.

Another key contention was not about monetary benefit sharing per se, but about what type of monitoring would need to be put in place to ensure that some types of monetary benefit sharing would be implementable⁴⁰. For example, a benefit sharing system coupled to the actual revenue from the commercialization of MGRs and DSI from ABNJ requires the origin of individual samples and information to be tracked across the (often publicly financed) research, the (usually private sector financed) product development, patenting and eventually commercialization phases and potentially require information.

38 This differs significantly from the benefit sharing of the Nagoya Protocol under the CBD, where monetary benefits are shared bilaterally, on mutually agreed terms, but are not necessarily used towards advancing the objectives of the CBD.

39 IISD/ENB (2023) Summary of the Resumed Fifth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 20 February – 4 March 2023

40 Langlet, A., Dunshirn, P. (2023) Traceability options for marine genetic resource from areas beyond national jurisdiction. High Seas Alliance Policy Brief

MGRs – Key processes & institutions

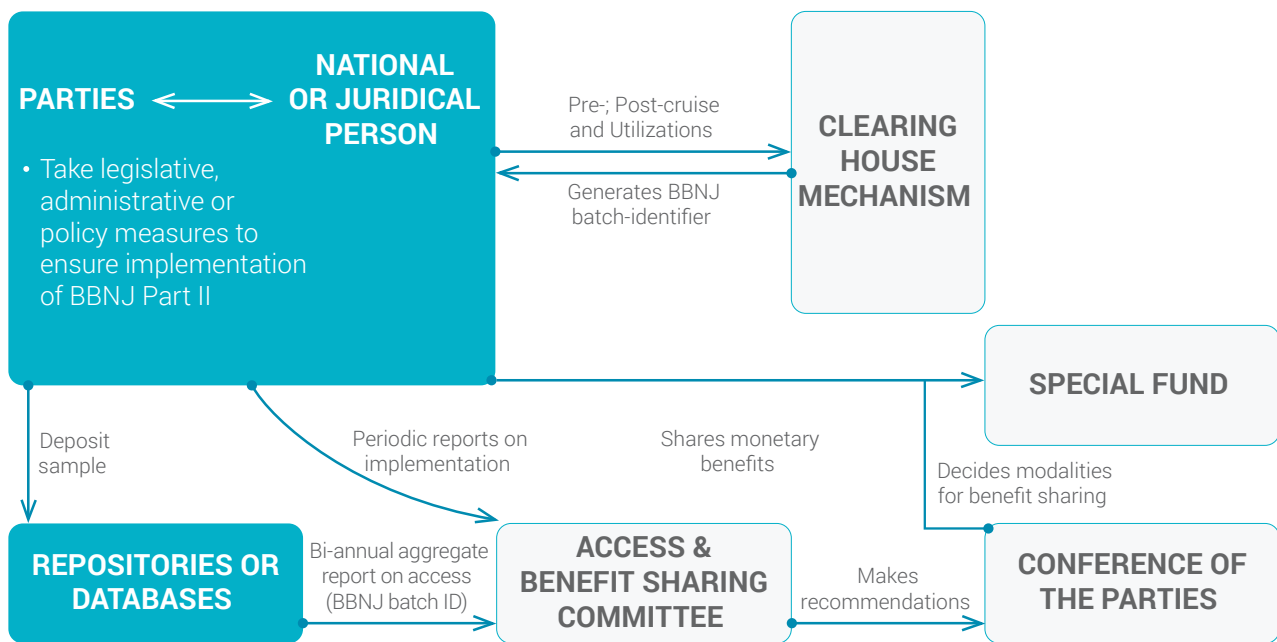


Figure 2: Key processes and institutions under Part II (MGRs) of the BBNJ Agreement. Filled arrows represent actions explicit in the Agreement, blue squares depict institutions part of the BBNJ Agreement, green squares depict institutions or actors that are under national jurisdiction.

that is, at least in current practice, proprietary, commercially sensitive and also tied into intellectual property law. States, private sector and academics involved in such research were concerned that a track and trace system, in particular if it also involved DSI, would cost more than the overall commercial benefits accrued through MGR related activities- at least in the near term- and create incentives for actors to circumvent BBNJ provisions, for example by focusing their activities on areas within national jurisdiction. On the other side of this spectrum was the option of monetary benefit sharing fully decoupled from the actual value of MGR and DSI commercialization and tying it to information that is more readily available, which could include the size of relevant sectors, the share of patents in public databases, or the UN's scale of assessed contributions⁴¹.

As explained above the final text settled on a decoupled payment system, only for developed countries, and tied to Parties' annual assessed

contributions, but left the option open for the CoP to decide on different modalities in the future with the option of a three-quarters majority vote, including listing examples for potential future modalities of benefit sharing systems:

The modalities may include the following:

(a) Milestone payments;

(b) Payments or contributions related to the commercialization of products, including payment of a percentage of the revenue from sales of products;

(c) A tiered fee, paid on a periodic basis, based on a diversified set of indicators measuring the aggregate level of activities by a Party;

(d) Other forms as decided by the Conference of the Parties, taking into

⁴¹ Ibid. For an explanation of assessed contributions see footnote 38.

account recommendations of the access and benefit-sharing committee.

Given the potential financial repercussions of a change in the monetary benefit sharing modalities, some States wanted the CoP to only be able to take this decision by consensus, which led to other States asking for consensus decision making in other parts of the text. The structure of the compromise is, similar to other parts of the BBNJ Agreement, a very constrained option to opt-out of new monetary benefit sharing modalities adopted by the CoP, but only for up to four years and these Parties would continue to pay the default payment tied to their assessed contributions.

Another, tightly interlinked, issue, pertained to whether or not BBNJ's provisions on MGRs would also apply to its digital representation, DSI, in particular against the background of a decision by the CBD, in principle, with operationalization pending, to establish a multilateral benefit sharing system for DSI from national jurisdictions⁴². On the one hand, many States expressed an appetite to build on the principles in the CBD DSI decision and not to create incompatible systems, in particular as scientists and technical advisors stressed that scientific practice did not differentiate between different sources of DSI, using the same databases and that currently less than 1% of sequences in the database are from areas beyond national jurisdiction⁴³. On the other hand, it is important to acknowledge the different starting points for the discussion. In CBD, the jurisdiction of DSI was clearly national jurisdiction. In the BBNJ context some delegations were of the view that MGRs and DSI from areas beyond national jurisdiction fall under freedom of the high seas and others that they would fall under common heritage of humankind under UNCLOS. In the final Agreement, DSI is included in almost all

provisions, and the text specifies that the CoP in deciding future modalities of monetary benefit sharing should be mutually supportive of and adaptable to other access-and benefit sharing mechanisms, maintaining a link to CBD's DSI decision and presenting an opportunity to potentially align the two systems in the future.

Last but not least, many delegations contested that the requirements for transparency along the chain of custody for marine genetic resources may also have interactions with the Intellectual Property Rights Regime and the draft text had a paragraph to acknowledge this connection⁴⁴, but it was deleted in the final negotiations, in part because other delegations did not want to prejudice future WIPO negotiations on disclosure of origin⁴⁵.

Considerations on implementation

The decision by drafters to make retroactive applicability of the provisions the default option is helpful to avoid the mis-use of "pre-convention specimen" to circumvent BBNJ regulations. If, on the other hand, a State were to make an exception in writing, its implementation would be particularly difficult for DSI, which is usually stored in large multinational databases and the depositing country may not even be stated prior to the entry into force of the BBNJ Agreement.

While the final Agreement found compromises for many key disagreements, it also left some details to be decided or adapted in the future. Among them is the interrelation between BBNJ's MGR and DSI benefit sharing system and the CBD's future system, which will likely remain a hotly debated issue during BBNJ's initial years. Because it reflects a hard-won balance, many delegations and stakeholders

42 CBD Decision CBD/COP/DEC/15/9

43 Hartman Scholz, A. Lange, M. Habekost, P. Oldham, P. Cancio, I. Cochrane, G Freitag, J. (2021) Myth-busting the provider-user relationship for digital sequence information

44 Paragraph 12 of the "further revised draft text" (A/CONF.232/2022/5)

45 Bengoa-Rojas, C. Yentcharé, P-Y. M. (2021) Multilateral Matters #10: A Sea of Possibilities: Intellectual Property Considerations in the BBNJ Negotiations (Part Two), <http://ip-unit.org/2021/multilateral-matters-10-a-sea-of-possibilities-intellectual-property-considerations-in-the-bbnj-negotiations-part-two/>

will want to take great care not to upset that balance going forward.

Interrelated with the future of the benefit-sharing system, it's important to note that while there is great potential in the sector, there is also some uncertainty about the future size of overall benefits, as to date only few documented economic benefits have arisen from MGRs from ABNJ⁴⁶.

Compared to other parts of the Agreement, the provisions on consultation and coordination with other relevant bodies with regards to MGR and related DSI focus mainly on the benefit-sharing provisions, not the activities themselves and further guidance may be helpful in the future on this matter.

46 Blasiak et al. (2020). Some examples for potential future products are e.g. laundry detergents, industrial enzymes, biotech enzymes, cosmetics, nutraceuticals, pharmaceuticals.

3. ABMTs, including MPAs

Summary: What does it do?

Area-based management tools, including MPAs, are an important component of the marine conservation toolbox⁴⁷ and spatial planning, yet processes to create them in areas beyond national jurisdiction, and their subsequent scope, have only existed within a few regional organizations (e.g. The Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention) and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)) and their membership. Closing this gap and establishing an overarching legal framework to allow for the creation of Area-Based Management Tools (ABMTs) anywhere in ABNJ was a key objective for many States and stakeholders in starting the BBNJ negotiation process in the first place⁴⁸.

Parties, drawing on a list of indicative criteria and under an obligation to consult widely, can submit proposals for the creation of ABMTs. The proposals require inclusive, transparent and open consultations and are reviewed by the Scientific and Technical Body. The CoP, taking into account the consultations and the advice by the STB can then take a decision to either establish the ABMT and related measures (Art. 22.1 a), and/or make a recommendation to an existing body to do so (Art. 22.1c). In doing so, the CoP shall respect and not undermine existing relevant instruments, frameworks and bodies.

The BBNJ Agreement allows for majority decision making on ABMTs, at the cost of giving Parties a heavily constrained possibility to opt-out of ABMTs. This is critically important, given that past attempts to establish MPAs in the CCAMLR context have been blocked by a small number of countries, because decisions

to establish MPAs must be made by consensus agreement of its Members.

The obligation to ensure that actors under their jurisdiction comply with the ABMTs and their management plans falls to Parties, as does the requirement to monitor implementation, individually or collectively. That said, the ABMT part of the Agreement explicitly lists support to developing countries, including through capacity building and the transfer of marine technology under its objectives and there is a recognition that its implementation should not impose a disproportionate burden on Small Island Developing States (SIDS) or landlocked countries.

Lastly, the ABMT part also contains a standalone provision that is explicitly broader than the process to establish ABMTs and allows the CoP to adopt emergency measures (which are not limited to ABMTs) in the face of potential serious or irreversible damage.

Figure 3 provides an overview of the key processes and institutions under the ABMT chapter.

Main elements

One of the objectives of the ABMT section is to encourage Parties to create “a comprehensive system of ABMTs, with ecologically representative and well-connected networks of marine protected areas”. These are defined as:

“Area-based management tool” means a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable

47 Caldeira, M., Teixeira, H. Hilário, A (2023) Negotiations to implement area-based management tools beyond national jurisdiction: the scientific community's view

48 See e.g. IUCN Resolutions WCC 2000 RES 020

use objectives in accordance with this Agreement.

and

“Marine protected area” means a geographically defined marine area that is designated and managed to achieve specific long-term biological diversity conservation objectives and may allow, where appropriate, sustainable use provided it is consistent with the conservation objectives.

ABMTs cover a range of spatial management measures, while MPAs have an emphasis on long-term conservation, consistent with the IUCN’s definition of protected areas. The

fact that MPAs are explicitly mentioned as a subcategory of ABMTs and that the objective of this part of the Agreement includes the establishment of a connected network of MPAs, greatly emphasizes their importance within the overall objective.

Proposals under the ABMT part of the Agreement can be submitted to the Secretariat by Parties, individually or collectively, and are required to be based on best available science, and where available relevant traditional knowledge of Indigenous Peoples and local communities (IPLCs), and make a case that the proposed area meets at least one of the criteria in Annex I of the Agreement (see **Figure 3**).

ABMTs – Key processes & institutions

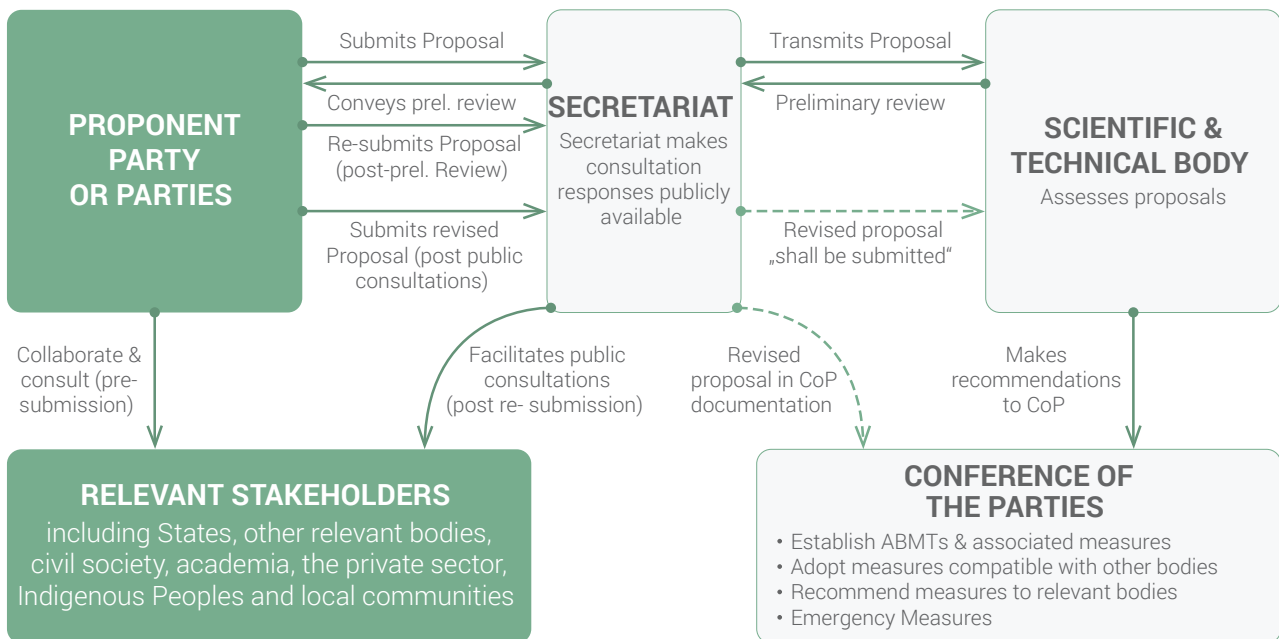


Figure 3: Key processes and institutions under Part III (ABMTs) of the BBNJ Agreement. Filled arrows represent actions explicit in the Agreement, dashed arrows represent actions implied or otherwise necessary, blue squares depict institutions part of the BBNJ Agreement, green squares depict institutions or actors that are under national jurisdiction.

There is also an obligation for Parties to conduct inclusive, transparent and open consultations in the development of the proposal. In addition, proposals must include information on, for example:

(...)

(c) Human activities in the area, including uses by Indigenous Peoples and local communities, and their possible impact, if any;

(d) A description of the state of the marine environment and biological diversity in the identified area;

(e) A description of the conservation and, where appropriate, sustainable use objectives that are to be applied to the area;

(f) A draft management plan encompassing the proposed measures and outlining proposed monitoring, research and review activities to achieve the specified objectives;

(...)

(i) Information on area-based management tools, including marine protected areas, implemented under relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies;

(j) Relevant scientific input and, where available, traditional knowledge of Indigenous Peoples and local communities.

It is worth noting that the criteria in Annex I of the Agreement build on, but greatly expand the CBD's criteria for "ecologically or biologically significant areas (EBSAs)⁴⁹ adding for example "ecological connectivity", "cumulative and transboundary impacts", but also economic and social factors.

Submitted proposals are made publicly available, reviewed by the Scientific and Technical Body (STB), while the Secretariat facilitates inclusive, open, transparent and time-bound consultations, including with adjacent States, relevant global regional or subregional bodies, IPLCs, the scientific community, civil society and other relevant stakeholders. The proponent state(s) have an opportunity, but no obligation, to revise or update their proposal, which will then be considered by the CoP next to the recommendations of the Scientific Body.

The CoP has three distinct powers with regard to ABMTs. It is empowered to:

1. Establish ABMTs, including MPAs and associated measures;
2. Adopt measures that are compatible with those adopted by other bodies; and
3. Recommend measures to other relevant competent bodies.

The CoP can make a decision after taking into account the consultations and the advice by the STB, and existing bodies. In doing so it shall respect the competences of and not undermine relevant instruments, frameworks and bodies. If all efforts to reach consensus have been exhausted, the CoP can take decisions by a three-quarters vote.

During a limited time-period after a decision, a Party can opt-out with a written explanation, but is required, to the extent practicable to adopt alternate measures, to not undertake activities which would undermine the decision it has objected to and report on its alternative actions taken to CoP. It also needs to renew its opt-out, including written justification, every three years.

The Agreement also considers the reverse process, i.e. the BBNJ CoP developing a mechanism to recognize ABMTs already adopted under a relevant global, regional, subregional or sectoral body, where such a recognition would be required to achieve the objectives and the implementation of its ABMT part.

49 CBD decision IX/20, Annex I

Lastly, the ABMT part also contains a standalone provision that is explicitly broader than the process to establish ABMTs and allows the CoP to adopt emergency measures (not limited to ABMTs) in the face of potential serious or irreversible damage. Such emergency measures can be proposed both by Parties or recommended by the STB and may be adopted intersessionally. They shall be temporary and need to be renewed by the CoP and terminate at the latest 2 years after their entry into force.

The BBNJ Agreement includes a general obligation for Parties to implement and monitor the implementation of ABMTs, as well as report on the implementation, but does not go into any detail regarding what this will entail. The Agreement allows Parties to adopt more stringent measures for their nationals and vessels, or with respect to activities under their jurisdiction or control, in accordance with international law and in support of the objectives of the Agreement.

This section includes considerations on non-Parties: Firstly, Parties to BBNJ shall encourage Non-Parties to adopt measures supporting the ABMT or MPA established by BBNJ. It also recalls that States that are Parties to UNCLOS, but not BBNJ, still have general obligations to cooperate on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

Key discussions and where they landed

After MGRs, ABMTs were another part of the Agreement where strong divisions had to be bridged, and major compromises were necessary to proceed. Compared to MGRs where that division ran along a North-South divide, it was however only a small number of States that held deeply entrenched views.

Against the backdrop of experiences in other bodies that consensus on the establishment of MPAs can sometimes be hard to reach⁵⁰,

it was a major priority for many States to include some form of decision making that could not be blocked by a small number of countries. Including the possibility of opt-out was a difficult, but necessary, compromise to achieve this objective. The idea was, however, to make this opt-out difficult by requiring an elaborate justification and alternative measures. As seen in other parts of the Agreement, the compromise reached has several layers and puts several constraints on Parties' opt-outs, namely:

- Opt-outs require a written explanation and can only be based on one or more of the following grounds:
 - (a) *The decision is inconsistent with this Agreement or the rights and duties of the objecting Party in accordance with the Convention;*
 - (b) *The decision unjustifiably discriminates in form or in fact against the objecting Party;*
 - (c) *The Party cannot practicably comply with the decision at the time of the objection after making all reasonable efforts to do so*
- Parties that have opted out of an ABMT-related decision need to adopt, to the extent practicable, alternative, and equivalent measures and approaches and, except for very specific circumstances, not take actions to undermine the effectiveness of the decision.
- Parties that have opted out of an ABMT-related decision are required to report to the BBNJ CoP on their fulfillment of the above obligations.
- Opt-outs expire automatically after three years, unless a Party renews it, again in written form and based on one or more of the grounds listed above.

It is also worth noting that, contrary to Target 3 of the Kunming-Montreal Global Biodiversity Framework, the BBNJ Agreement does not explicitly reference "other effective area-based

50 IUCN News (2023) Who is assigned to protect Antarctic ecosystems and their famous fauna? <https://www.iucn.org/news/202306/who-assigned-protect-antarctic-ecosystems-and-their-famous-fauna-latest-news>

conservation measures” (OECMs⁵¹) in the relevant definitions or objectives, although this had been a priority for some countries and stakeholders but it was important to Parties in the end not to conflate the two terms, barring more specific consideration and guidance.

Another compromise that was critical in the final days of IGC5.2 was discussed in the context of disputed areas. The resulting paragraph does not explicitly mention disputed areas but sets out restrictions on the CoP’s ability to consider ABMTs where they assert or deny claims of sovereignty (Article 18) and it remains to be seen how broadly or narrowly the relevant text will be interpreted in the future.

Considerations on implementation

In 2022, the United Nations CBD adopted the Kunming-Montreal Global Biodiversity Framework, which includes the global target of protecting at least 30% of the ocean by 2030 through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures as part of a healthy interconnected seascape. Given that ABNJ makes up for ~64 % of the ocean, meeting this target will likely require MPAs and other ABMTs in ABNJ. The IUCN World Congress in 2020 also highlighted that the conservation and sustainable use of marine biological diversity in ABNJ requires a substantial portion of highly and fully protected MPAs, in addition to other types of ABMT⁵². Given the many tasks related to the basic set-up of the Institutions of the BBNJ Agreement on the Agenda of the first CoP (see Chapter 6 below) and the steps necessary for ABMTs to be adopted under BBNJ, Parties

will need to consider possibilities to speed up early operationalization of the relevant BBNJ institutions or otherwise lighten the load of the first CoPs, in order to realistically meet the 2030 deadline. They could do so for example through a BBNJ PrepCom that could already draft key documents and guidelines while waiting for entry into force of the Agreement⁵³.

With regards to information about potential areas for future ABMTs or MPAs, there are many preexisting efforts to compile, assess and prioritize areas in need of protection. These include Ecologically and Biologically Significant Areas ([EBSAs](#)⁵⁴), Key Biodiversity Areas ([KBAs](#)⁵⁵), or more specific ones such as Important Marine Mammal Areas ([IMMAs](#)⁵⁶), Important Shark and Ray Areas ([ISRAs](#)⁵⁷) and Important Bird and Biodiversity Areas ([IBAs](#)⁵⁸), just to name a few⁵⁹. A review of these areas can be useful to inform site selection, prioritization and network design within the objectives and processes of BBNJ, but also for identifying gaps in knowledge.

An area of future implementation that is already attracting a lot of attention pertains to the BBNJ Agreements’ interactions with the large number of existing global, regional and subregional bodies. While the BBNJ Agreement as a whole and the section on ABMTs specifically establishes obligations “not [to undermine] relevant existing bodies” their operationalization, and in particular the determination of what constitutes “relevant” and what constitutes “undermining” will require additional guidance and will continue to evolve with experience gained in BBNJ implementation. The BBNJ Agreement has given the CoP a mandate to “*make arrangements for regular consultations [with other relevant bodies]*” will be very helpful

51 IUCN defines OECMs “areas that are achieving the long term and effective in-situ conservation of biodiversity outside of protected areas

52 IUCN WCC- 2020-Res-1281

53 High Seas Alliance (2023) Policy Brief: [How could a preparatory commission contribute to rapid and effective implementation of BBNJ?](#)

54 <https://www.cbd.int/ebsa/>

55 <https://www.keybiodiversityareas.org/>

56 <https://www.marinemammalhabitat.org/immas/>

57 <https://sharkrayareas.org/>

58 <http://datazone.birdlife.org/site/ibacriteria>

59 This list is not exhaustive and the authors acknowledge that there are other existing and emerging prioritization efforts that may offer useful information for BBNJ processes.

in advancing the practical implementation of these provisions and help resolve concerns about “not undermining” such bodies.

Another area where the future BBNJ Agreement will greatly benefit from additional guidance is regarding the implementation and monitoring of ABMTs and MPAs. It is well established in scientific literature that in order for ABMTs to deliver on their objectives, it is crucial that a management plan designates an authority responsible for overseeing its day-to-day implementation on the water. An important component of this will be the monitoring plan. e.g. of the biophysical environment and human activity⁶⁰. In the BBNJ Agreement monitoring of ABMTs is only mentioned as part of the draft management plan, which in turn is a key element of an ABMT proposal, but no additional details or requirements are set. The level of monitoring of early ABMTs and MPAs established under the BBNJ Agreement will therefore fully depend on the proponents’ level of ambition and capacity.

The more general obligation to “monitor implementation” could be interpreted to include some of the above site monitoring, but the treaty does not provide further pointers for answering this question. The obligation to monitor implementation seems to be primarily vested in Parties, individually and collectively (Article 26), which must report periodically to the CoP, but the STB also has a role in monitoring and reviewing ABMTs, taking into account – but not explicitly limited to – reports by Parties. There are also roles foreseen for relevant global, regional and subregional bodies to provide information and the STB to monitor and periodically review ABMTs.

Lastly, States have been willing to make significant concessions, both to calm concerns about ABMTs in disputed areas and allowing for opt-outs, in order to maintain the option of majority decision making in the ABMT section. It will remain to be seen how BBNJ Parties continue to evolve these particular compromises, with likely impacts on other parts of the Agreement.

60 Cremers, K., Bouvet, M., Wright, G., Rochette, J. (2021) “Options for Strengthening Monitoring, Control and Surveillance of Human Activities in the Southeast Atlantic Region”, STRONG High Seas Project

4. EIA

Summary: What does it do?

Environmental impact assessments (EIAs) are a common tool in national and international frameworks to evaluate and inform decision makers about the likely environmental impacts of a proposed project or development, as well as how the project development can be improved to avoid possible adverse effects. While UNCLOS does not specifically mention the term EIA, it establishes a broadly equivalent obligation⁶¹ applicable to the marine environment, including areas beyond national jurisdiction, that requires Parties to assess the potential effects of activities under their jurisdiction and control, when they have reasonable grounds for believing that such activities may cause substantial pollution of or significant and harmful changes to the marine environment in ABNJ. While some sector- and region-specific frameworks have included EIA provisions⁶² and the International Court of Justice has recognized EIAs as a duty under International Law in certain cases⁶³, no uniform EIA requirements or standards for ABNJ exist. Additionally, some of the existing EIA requirements are antiquated and no longer represent modern standards⁶⁴.

The EIA part of the BBNJ Agreement fills this gap by establishing basic modern requirements for assessing and managing planned human activities affecting marine biodiversity in ABNJ. The scope of these provisions covers both activities taking place in ABNJ as well as activities taking place within national jurisdiction if there is a possibility that it would cause substantial pollution of or significant and harmful changes to the marine environment in ABNJ. However, if the activity takes place within national jurisdiction, the State can choose to follow its

National EIA process, instead of the full BBNJ EIA process, with some additional transparency, monitoring and reporting measures. Similarly, if an activity takes place in areas beyond national jurisdiction but has already been assessed under another relevant legal instrument, framework or body with a sufficiently high standard, the State does not need to follow the full BBNJ EIA process, but still must fulfill transparency provisions. Provisions that apply to all scenarios include that Parties are required to share relevant EIA reports with the CHM, and are obligated to promote the use of the standards and guidelines developed by the STB. Such future guidance developed by the STB and CoP, in collaboration with other relevant instruments, frameworks or bodies, further has the potential to further improve how human activities affecting ABNJ are assessed and managed.

Part IV of the Agreement⁶⁵ also provides for strategic environmental assessments, an important step in planning activities in and synthesizing the best available information for a given area or region.

The BBNJ Agreement leaves both the responsibility to conduct an EIA and the subsequent decision whether to allow the activity to the Party under whose jurisdiction or control a planned activity falls, but it establishes public notification and consultation obligations which greatly improve transparency. Other Parties can also register concern about specific activities, and the possibility for a review and recommendations by the STB creates further accountability.

Figures 4 provides an overview of the key processes and institutions of the EIA chapter.

61 UNCLOS Article 206: "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 [...]"

62 Druel, E (2013) Environmental impact assessments in areas beyond national jurisdiction. IDDDRI Study

63 Payne, C. (2010) Pulp Mills on the River Uruguay: The International Court of Justice, Recognizes Environmental Impact Assessment as a Duty under International Law. 14(9) ASIL Insight.

64 Hassanali, K. (2023) The Agreement on Biodiversity in Areas Beyond National Jurisdiction – Caribbean Community perspectives on interests, asks and outcomes. Marine Policy 156 (2023) 105800

65 See Art. 39 BBNJ Agreement

EIAs – Key processes & institutions

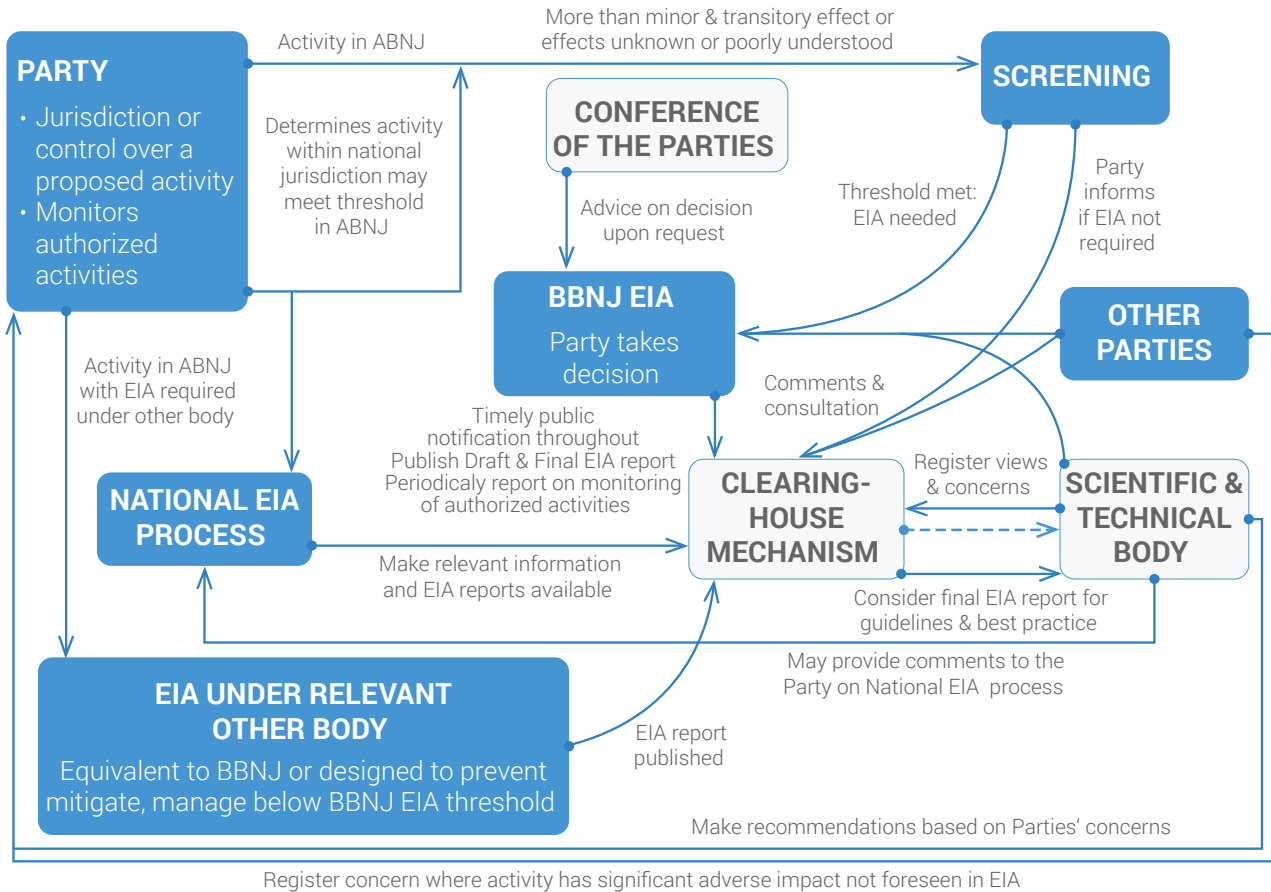


Figure 4: Key processes and institutions under Part IV (EIAs) of the BBNJ Agreement. Filled arrows represent actions explicit in the Agreement, dashed arrows represent actions implied or otherwise necessary, blue squares depict institutions part of the BBNJ Agreement, green squares depict institutions or actors that do not fall under BBNJ. Green bubbles represent activities or processes that do not fall under BBNJ.

Main elements

The overall objective of the EIA section of the BBNJ Agreement is to operationalize UNCLOS EIA provisions by setting common processes and standards, and to achieve a modern, coherent, consistent EIA framework for activities impacting ABNJ.

Taking into account considerations of jurisdiction and the BBNJ's overarching consideration not to undermine existing relevant bodies, this covers a minimum of 3 scenarios:

- Activities taking place in ABNJ
 - That are not covered by an existing sectoral or regional body (Art 28.1)

- That are covered by an existing sectoral or regional body (Art 28.1, Art 29)
- Activities taking place within national jurisdiction but potentially affecting ABNJ. (Art 28.2)

The obligations under the Agreement cover all three scenarios, with differences between the processes.

EIAs under BBNJ are a multi-layered process. For the simplest case (activities occur in ABNJ, not covered by an existing sectoral or regional body) the first trigger is when a planned activity *"may have more than a minor or transitory effect on the marine environment, or the effects of the activity are unknown or poorly understood"* in which case the Party is required to conduct

an initial screening. If based on the screening there are “reasonable grounds for believing that the activity may cause substantial pollution of or significant and harmful changes to the marine environment” a full EIA needs to be conducted in accordance with the provisions of the Part IV of the Agreement. It is important to note the wording is a “planned activity”, because activities that are already ongoing when the BBNJ Agreement enters into force would likely not trigger these provisions retroactively.

Scenarios under which no full BBNJ EIA is required

If the State finds that no EIA is required, it needs to make its finding and the relevant information publicly available through the CHM, at which point other Parties can register their views with the Party that made the determination, if any, and the STB can be called in to review and make recommendations, all of which will need to be considered by the Party that made the determination.

For activities that take place within national jurisdiction but that meet the second threshold (“may cause substantial pollution of or significant and harmful changes to the marine environment”), a State has the choice to either conduct an EIA in accordance with Part IV of the Agreement, or use its national process (see **Figure 4a**). In the latter case, the State would need to make relevant information available through the CHM and ensure that the activity is monitored.

For activities taking place in ABNJ that are subject to assessment under another legal framework, a State needs to nevertheless determine if the other assessment is equivalent to the BBNJ EIA provisions, or, alternatively, if the regulations or standards arising from the assessment under the other legal instrument were designed to prevent mitigate or manage potential impacts below BBNJ’s threshold for EIAs. If either of these conditions are met, no new screening or EIA needs to be conducted, but the State shall ensure that the EIA report is published via the CHM.

Scenarios where a full BBNJ EIA is required

Where an EIA under the BBNJ provisions (in accordance with Art. 31) is required, the State conducting it needs to consider best available science, and where available, relevant traditional knowledge of IPLCs, and consider key environmental as well as cumulative impacts. The State must also ensure that measures to prevent, mitigate and manage potential adverse impacts are identified to avoid significant adverse impacts and to incorporate them into a management plan where appropriate. Parties are further required to ensure public notification of planned activities, as well as broad participation and consultation, in particular by adjacent coastal and other potentially affected States and stakeholders. Both the results of the scoping and the draft EIA report must be made available through both the CHM and Secretariat.

The BBNJ Agreement also sets out minimum requirements for EIA reports, which include, *inter alia*, a baseline assessment of the marine environment likely to be affected, a description of potential impacts (including cumulative impacts), and a description of the consideration of alternatives to the activity. Importantly, the STB has an opportunity to consider and evaluate the draft report and to make comments that are to be considered by the Party.

The State is responsible for making the decision whether or not to approve the activity. Such a decision should only be made when mitigation or management measures have been taken into account and the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts of the marine environment. The State can seek the advice and assistance of the CoP in making its decision.

Monitoring of authorized activities

If the State approves the activity, it is required to monitor the impacts, including environmental, social, and economic impacts. Parties, individually and collectively, must periodically report on the impacts of the authorized activity

and such monitoring reports are to be published through the CHM and considered and evaluated by the STB. Where unforeseen impacts are detected or conditions specified in the decision to approve an activity are changed, the Party must review its decision and propose and implement measures to prevent, mitigate or manage such unforeseen impacts, or halt the activity. Other Parties, including the STB can at this point also again make comments and raise concerns that the State then needs to consider.

In addition to its review and advisory functions during the EIA process, the STB also has a mandate to develop a range of standards and guidelines, including, for example, on whether the thresholds for conducting a screening or an EIA have been met or exceeded and how cumulative impacts should be taken into account in the EIA process. The CoP then considers and may adopt the STB proposals. The mandate for the CoP and STB to develop such standards and/or guidelines combined with the obligation for BBNJ Parties to promote the use of EIAs and these guidelines under relevant instruments, frameworks and bodies is an opportunity towards generating a coherent and consistent approach to EIAs in ABNJ over time.

Strategic Environmental Assessments

The EIA section of the Agreement provides for Strategic Environmental Assessments, which are not focused on a specific activity but rather aim to collate or synthesize the best available information for a proposed policy, plan or programme or more broadly to assess current and potential future impacts in an area or region to guide further initiatives.

Key discussions and where they landed

One key discussion for the EIA part of the BBNJ Agreement was centered around whether the obligation to conduct an EIA would only cover activities based on their location, i.e. an activity taking place in ABNJ and not those occurring

within national jurisdiction or whether the obligation would also extend to cover activities based on effects and hence include activities taking place within national jurisdiction but affecting ABNJ. The final text strikes a balance, putting some transparency obligations on Parties for activities taking place within their national jurisdictions that affect ABNJ, a major concession for some States, at the cost of leaving Parties the option of following their, potentially weaker, national EIA processes.

A similar compromise was struck on the relationship between the BBNJ Agreement and existing relevant regional or sectoral bodies. In this case, the final text of the Agreement, provides Parties with the option of not having to undertake a new screening or EIA if they have determined that the processes of the existing body are equivalent. At the same time, this exception is counterbalanced by Parties' general obligation, reiterated also in the EIA section, to promote the objectives of the BBNJ Agreement and the standards and guidelines adopted by the CoP in relevant bodies they are members of.

Possibly the discussion with the most impactful outcome for the final Agreement was to what degree the EIA process as a whole and decision making about the authorization of an activity should be international, i.e. review by the STB and decided by the CoP, or national, with the Agreement taking the route of national decision making but maintaining an option for concerned Parties to raise concerns and "call in" the STB for review and recommendations.

Considerations on implementation

Given that a general obligation to conduct EIAs is already established in UNCLOS and a general principle of international law⁶⁶, States in principle do not have to wait to promote the considerations they have been able to agree to in the BBNJ Agreement in other existing relevant agreements. Going a step further, the

66 Payne, C. (2010) Pulp Mills on the River Uruguay: The International Court of Justice, Recognizes Environmental Impact Assessment as a Duty under International Law. 14(9) ASIL Insight.

BBNJ Agreement also allows for provisional application (Art 69).

Similarly, while the BBNJ EIA provisions trigger for “planned activities”, Parties could consider applying them voluntarily to activities that are ongoing when the Agreement enters into force. Further guidance is also needed if an existing activity that changes in nature or scale would trigger the BBNJ EIA regime.

In terms of examples for future application a number of new activities have already been identified for which there is no established relevant body with the authority to assess and manage those activities. These include for example the construction of floating cities (“seasteading”), large scale floating aquaculture operations, floating renewable energy or nuclear facilities, plastic collection activities; and climate change mitigation or geoengineering proposals⁶⁷.

67 High Seas Alliance (2021) [How could the EIA provisions of the BBNJ Agreement apply to activities and existing bodies?](#). Policy Brief, July 2021.

5. CBTMT

Summary: What does it do?

Capacity building and technology transfer under the BBNJ Agreement is both an obligation by itself, as well as a means of implementation for other parts of the Agreement. It is also one of the ways in which the principle of equity is operationalized in the Agreement. UNCLOS already includes provisions on international cooperation and scientific and technical assistance to developing countries in the context of the protection of the marine environment⁶⁸, as well as a Part dedicated to the development and transfer of marine technology⁶⁹, but many States and stakeholders have criticized that these provisions have not been fully operationalized, constrained by weak language and the lack of a comprehensive institutional mechanism⁷⁰. The BBNJ Agreement seeks to learn from this experience by adding many operational elements from the start, including incorporating a funding source (e.g. through the MGR provisions) and establishing a monitoring and review framework and even a separate committee, the capacity building and transfer of marine technology committee, to ensure that the implementation of this part of the Agreement is continuously being followed up on.

See **Figure 5** for an overview of the key processes and institutions under CBTMT chapter.

Main elements

The objectives of this part of the Agreement are tightly interlinked with the objectives of the treaty as a whole and aim to assist Parties, in particular developing State Parties and Parties under special circumstances in implementing the other parts of the Agreement through

capacity building and the transfer of marine technology.

Key ideas present throughout this part include:

- Promoting broad cooperation at all levels and in all forms, including for example explicitly the private sector, civil society and IPLCs.
- Capacity building and transfer of marine technology will be a “*country driven, transparent, effective and iterative process that is participatory, cross-cutting and gender-responsive*”.
- Capacity building and transfer of marine technology will also be needs based, with needs “*identified through needs assessments on an individual case-by-case, subregional or regional basis*”, either via self-assessment or facilitated by the CBTMT committee.

The part also sets out additional modalities regarding the transfer of marine technology and provides a non-exhaustive list of types of capacity building both in the text itself and in further detail in Annex II of the Agreement.

Capacity building and the transfer of marine technology under the BBNJ Agreement are subject to periodic review by the CBTMT committee, established in this part, under the authority of the CoP. Reviews are to include, among other things, assessing and reviewing the capacity needs of developing countries, identifying, and mobilizing funds, as well as reviewing the actual support provided and mobilized, as well as its performance on the basis of indicators and results-based analysis and make recommendations for follow-up activities. Parties are required to submit reports to the CBTMT committee.

68 UNCLOS Part XII, Section 3

69 UNCLOS Part XIV

70 Harden-Davies, H (2018) Marine genetic resources beyond national jurisdiction: an integrated approach to benefit-sharing, conservation and sustainable use, Doctor of Philosophy thesis, Australian National Centre for Ocean Resources and Security, University of Wollongong, 2018. <https://ro.uow.edu.au/theses1/557>

Key discussions and where they landed

Compared to other parts of the Agreement, the CBTMT part was the least controversial and was the earliest to be closed during the final negotiations⁷¹. That said, within the chapter, discussions on the modalities for the transfer of marine technology were the most controversial,

in particular to what extent they would be obligatory versus voluntary and the inclusion that transfer of marine technology shall take place on “fair and most favorable terms, including on concessional and preferential terms”. The latter was controversial because of its intersection with the intellectual property rights regime⁷².

CBTMT – Key processes & institutions

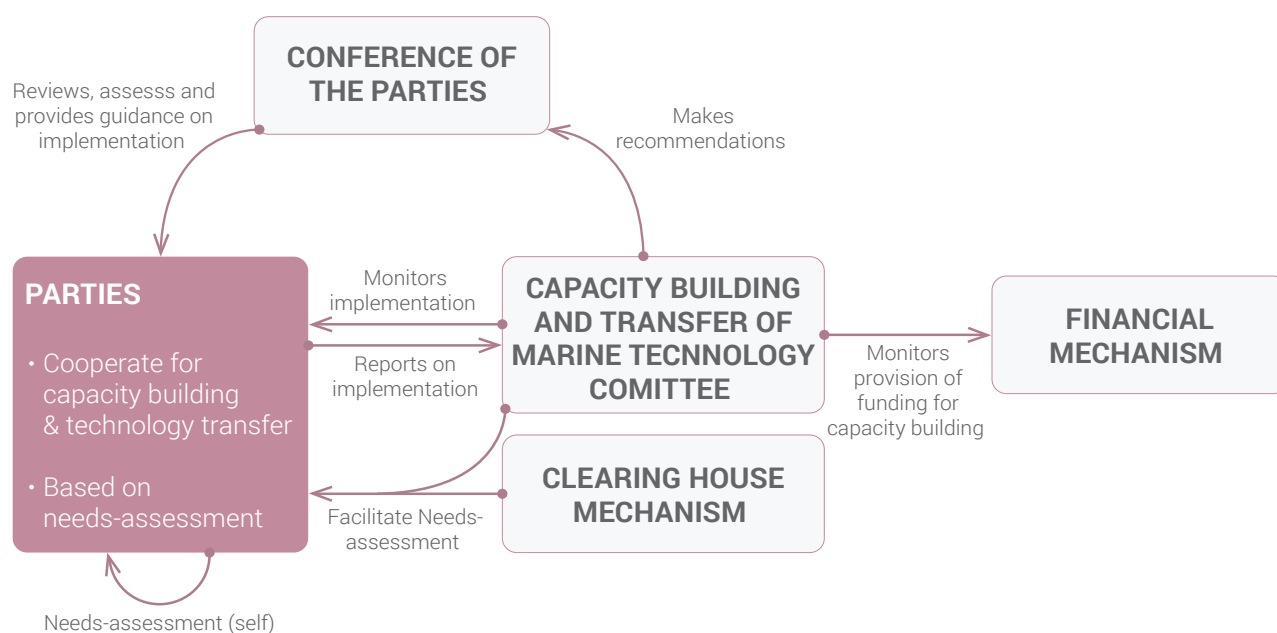


Figure 5: Key processes and institutions under Part V (CBTMT) of the BBNJ Agreement. Filled arrows represent actions explicit in the Agreement, dashed arrows represent actions implied or otherwise necessary, blue squares depict institutions part of the BBNJ Agreement, green squares depict institutions or actors that are under national jurisdiction.

Considerations on implementation

Early investment in activities under the CBTMT have the advantage that they go towards fulfilling obligations under a core pillar of the BBNJ Agreement while at the same time advancing Parties’, in particular developing States’, ability to implement other parts of the Agreement. Given that currently no template for needs-assessments under BBNJ exists and to ensure that these early investments can already be need-based, development of guidance and support tools to conduct needs-assessments

would be a great contribution towards early and effective operationalization of this part of the Agreement.

Identifying and mobilizing funding for the development and conduct of needs-assessment via the financial mechanism of the Agreement is among the tasks assigned to the CBTMTC, but the actual modalities of the committee (see 6.8) – and of parts of the financial mechanism (see 6.5 and 7) – remain to be determined by the CoP.

71 Harden-Davies, H. Lopes Ferreira, V. Fernandes Coelho, L. Nelson, G. Schutz Veiga, J. Talma, S. Vieeros, M. (Submitted) First to finish, what comes next? Putting Capacity Building and the Transfer of Marine Technology under the BBNJ Agreement into practice

72 IUCN (2019) IUCN Comments of 15 August 2019 on International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

6. Institutions and processes

6.1. Conference of the Parties

What does it do?

The BBNJ Agreement establishes a CoP as the principal decision-making body of the BBNJ Agreement. The CoP plays key roles in all parts of the agreement, including as the senior body to all subsidiary bodies created under the Agreement, and can create additional subsidiary bodies. The establishment of a CoP with broad functions as a key part of the functioning of the BBNJ Agreements is a change to UNCLOS approach, which does not have equivalent provisions for its meetings of State Parties (SPLOS) and contains few decisions to be taken by SPLOS. The BBNJ CoP shall make every effort to make decisions by consensus, it can adopt decisions by a vote with a simple majority for procedural matters and a two-thirds majority for substantive matters, unless otherwise specified in other parts of the Agreement.

In addition to all the functions assigned to it in other parts of the Agreement it can request advisory opinions by the International Tribunal on the Law of the Sea (ITLOS) regarding the conformity of any proposal under consideration by the CoP. It is also tasked with the regular review of the adequacy and effectiveness of the BBNJ Agreement as a whole and with promoting transparency in decision making and other processes under the BBNJ Agreement.

Composition

The CoP is composed of all Parties to the Convention.

Open Questions and considerations

The CoP will meet no later than one year after the entry into force of the Agreement and after that at regular intervals, yet to be determined. At its first meeting, it is expected to adopt Rules of Procedure by consensus, and until such time when they are adopted, continue to use the rules of procedure of the intergovernmental conference.

The frequency and other modalities of meetings of the CoP that are still to be decided will have significant knock-on effects on other institutions established under the Agreement, as well as meeting-related costs in the budget.

6.2. Scientific and Technical Body

What does it do?

The STB is an advisory body under the authority and guidance of the CoP to provide scientific and technical advice, including in its functions to review and make recommendations under the ABMT and EIA parts of the Agreement.

Composition

The STB will be composed of members serving in their expert rather than national capacity, taking into account the need for multidisciplinary expertise, gender balance and equitable geographical representation.

Open Questions

The terms of reference and modalities of the STB, including its size and exact composition, as well as the selection process and terms of members mandates remain to be determined by the CoP.

6.3. Secretariat

What does it do?

The Secretariat provides administrative support and facilitation for the effective implementation and functioning of the treaty, including the organizing and servicing of meetings of the bodies created by the treaty, manages the day-to-day activities related to the treaty, and provides assistance to Parties in the implementation of the Agreement. This includes the management of the CHM outlined below.

Composition

The Secretariat will be staffed by international civil servants. Until the Secretariat starts its functions, the Division for Oceans and Law of the Sea of the Office of Legal Affairs of the UN Secretariat will function as interim Secretariat.

Open Questions

Arrangements for the functioning of the Secretariat, including its size and seat, are to be determined by CoP1.

6.4. Clearing-House Mechanism

What does it do?

The CHM will primarily consist of an open access platform, managed by the Secretariat, to serve as a central hub for information exchange on the implementation of the Agreement, with specific functions for it set out in all parts of the Agreement. At the same time, it will also fulfill other functions, including facilitating matchmaking between capacity building needs and support available and facilitate cooperation and transparency, including with bodies and stakeholders outside of BBNJ.

Composition

The CHM will primarily consist of an open access platform, but given the functions assigned to it will likely also require some dedicated staff time by the Secretariat.

Open Questions and Considerations

Specific Modalities for the operation of the CHM are yet to be determined by the CoP. Given the central role of the CHM for successful implementation of large parts of the Agreement and the large number of specialized tasks it will be required to perform, prospective BBNJ Parties and the (interim-)Secretariat may wish to start thinking about its operationalization early and learn from the experience of other CHMs.

6.5. Finance Committee

What does it do?

The terms of reference and modalities of operation for the finance committee will be set by the Conference of Parties. The finance committee will assess needs of the Parties, availability and disbursement of funds, transparency and accountability, make recommendations to the COP on the identification and mobilization of funds and report on other funding mechanisms.

Composition

The committee shall be composed of members possessing appropriate qualifications and expertise, taking into account gender balance and equitable geographical distribution.

Open Questions

The finance committee is not the financial mechanism. The finance mechanism is established through Art. 52 and includes a Global Environment Fund (GEF) trust fund, a voluntary fund, and the special fund. The text is silent on the institutional set-up of the special fund. The first CoP will need to consider institutional modalities as well as the mobilization goal to 2030.

6.6. Implementation and Compliance Committee

What does it do?

The implementation and compliance committee's role is to facilitate implementation and promote compliance with the provisions of the Agreement at the individual and systemic level. It will function in a transparent, non-adversarial and non-punitive manner.

Composition

The committee will be composed of members, nominated by Parties, possessing appropriate qualifications and expertise, taking into account

gender balance and equitable geographical distribution.

Open Questions

The Rules of Procedure and modalities, including the size of the committee and selection process for its members, remain to be determined by the CoP.

6.7. Access and benefit-sharing committee

What does it do?

The Access and benefit-sharing committee (ABSC) is a subsidiary body established in the MGR section of the BBNJ Agreement to make recommendations and provide guidance on the implementation of the benefit sharing provisions thereunder, including making recommendations on potential future revisions of the monetary benefit sharing mechanism. It can also consult and facilitate the exchange of information with other relevant legal instruments and frameworks on these matters.

Composition

The ABSC will have 15 members, possessing appropriate qualifications in related fields, nominated by Parties and elected by the CoP, taking into account gender balance and equitable geographical distribution as well as providing for representation from Least Developed Countries (LDCs), Landlocked Developing Countries (LLDCs) and SIDS.

Open Questions

The terms of reference and modalities for the operation of the committee remain to be determined by the CoP.

6.8. Capacity-building and marine technology committee

What does it do?

The CBTMTC has a range of active and advisory functions in the CBTMT part of the BBNJ Agreement, including facilitating capacity needs-assessments and monitoring and reviewing the implementation of this part of the Agreement. It also makes recommendations and develops guidance.

Composition

The CBTMTC will consist of members possessing appropriate qualifications and expertise, nominated by Parties and elected by the CoP, taking into account gender balance and equitable geographical distribution as well as providing for representation from LDCs, LLDCs and SIDS.

Open Questions

The terms of reference and modalities for the operation of the committee, including its size, remain to be determined by the CoP.

7. Final cross-cutting issues

Summary: What does it do?

Similar to the “preamble” and “general provisions” sections at the beginning, the remaining cross-cutting sections include issues of overarching importance for the operationalization of the treaty, including transparency and funding. They also contain provisions that are designed to ensure the smooth functioning of the treaty and its adherence by the Parties involved by establishing a range of tools to mitigate and address potential future conflicts, from facilitative implementation and compliance approaches to dispute settlement. The final provisions set out important rules regarding the conclusion (e.g. entry into force and provisional application) and future modification of the treaty (e.g. amendment and Annexes).

Main elements

In the institutional section, the BBNJ Agreement emphasizes transparency across decision making processes and other activities carried out under the Agreement and tasks the CoP to promote it. This includes both participation in meetings of the CoP and its subsidiary bodies as well as the public dissemination of information.

The Funding mechanism established by the BBNJ Agreement has multiple components. The first two are common for multilateral agreements:

1. Mandatory assessed contributions from Parties fund the Institutions established by the Agreement
2. A voluntary trust fund supports the participation of developing State Parties in the meetings of the bodies established under the Agreement

In addition, the BBNJ Agreement sets out further sources of funding for multiple purposes outlined in the Agreement;

3. A special fund which will inter alia receive monetary benefits shared under the MGR part of the Agreement as well as additional voluntary contributions; and
4. The GEF.

The CoP can also decide to establish additional funds and will establish a finance committee to support the implementation of this part of the Agreement. The text also includes eligibility criteria for access to funding, which focus on needs by developing States.

With regards to ensuring the smooth functioning of the treaty and its adherence by the parties, the BBNJ Agreement includes a range of options to address non-compliance by Parties, ranging from a facilitative, non-punitive implementation and compliance approach to putting in place the option of dispute settlement.

For disputes of technical nature, the Agreement allows referral to an ad hoc expert panel, which may be more efficient than other dispute settlement mechanisms. The dispute settlement provisions also strike a careful balance with regards to the compulsory dispute settlement measures under UNCLOS, which apply to UNCLOS Parties, but not Non-Parties.

The final provisions also contain important provisions regarding the conclusion and future modification of the treaty, including the following:

- The treaty opened for signature on 20 September 2023 during General Assembly of the United Nations (UNGA) 78 at UN Headquarters, New York and will remain open for two years, i.e. until

20 September 2025. After that, it will remain open for accession⁷³.

- The treaty will enter into force 120 days after the 60th ratification, approval, acceptance or accession⁷⁴.
- Parties can agree to provisional application of the Agreement by notifying the depositary (the Secretary General of the UN).
- No reservations or exceptions to the Agreement can be made, unless specifically permitted in other articles of the Agreement. The only provision where an express permission is given to register an exemption is the retroactive application of the provisions of the MGR section to MGRs and DSI collected in ABNJ prior to the entry into force of the Agreement.
- Amendments can be proposed by Parties and a process is set out for when and how they would be considered by the CoP and when they would enter into force, if adopted.
- Annexes form an integral part of the Agreement and the proposal of new Annexes follows the rules for amendment of the Agreement. Amendments to existing Annexes follow a simplified route and can be proposed for consideration by the CoP.

Key discussions and where they landed

By far the most contentious discussions under this part concerned the financial mechanism, including but not limited to the link to the MGR section. This heightened importance of funding related discussions is also reflected in the text itself in raising the standard of decision making for financial matters to three-quarters vs the normal two-thirds majority for the adoption of the budget by the CoP (Art 47.6 e) and for the adoption of potential provisions for monetary benefit sharing (Art 14.7).

Considerations on implementation

As the BBNJ finance mechanism will enter into force when the Agreement enters into force, prior work to support countries in ratification and operationalization will be using other financial resources. The European Union (EU)⁷⁵ through its international ocean governance support as well as GEF 8 have considered this issue⁷⁶ and will already make funding from their ABNJ allotment available for specific activities to support ratification for developing countries.

73 "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. Full information on [UNTC](#)

74 For an excellent overview of the different processes for a party to agree to be bound by a treaty see Box 1 in Gjerde et al 2022:) Getting beyond yes: fast-tracking implementation of the United Nations agreement for marine biodiversity beyond national jurisdiction

75 See [Treaty of the High Seas to protect ocean biodiversity \(europa.eu\)](#)

76 GEF (2023) Document GEF/C.64/12/Rev.02, Preparing the GEF to serve as part of the financial mechanism of the internationally legally binding instrument under the United Nations convention on the law of the sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), https://www.thegef.org/sites/default/files/documents/2023-07/EN_GEF.C.64.12_Rev_02_Preparing_GEF_BBNJ%20to%20serve%20as%20part%20of%20the%20BBNJ%20FM.pdf

C. Next steps

The Agreement on the text of the BBNJ Agreement on 4th March 2023 and its subsequent adoption by consensus on 19 June 2023 have been widely hailed as the most important progress in ocean conservation in decades and a victory for multilateralism.

At the national level, the next steps to bring the BBNJ Agreement into force are for States to sign and subsequently ratify the Treaty, with the processes required varying between countries⁷⁷. The first day the Agreement opened for signature, 20 September 2023, ended with 68 signatories⁷⁸, a number which has climbed to 82 signatories by the end of the first week.

Next to signing and subsequently ratifying the Agreement, there are already actions Parties can take by themselves or in the context of existing relevant international frameworks, bodies or initiatives that can contribute to a rapid operationalization of the BBNJ Agreement⁷⁹.

At the level of the General Assembly, States can also take steps to facilitate early entry into force and contribute to rapid operationalization of the agreement, including empowering the interim Secretariat to support States in ratification and organizing a pledging conference to mobilize funding for BBNJ related activities, including ratification support to States, prior to entry into force⁸⁰. Given the many outstanding administrative and procedural steps to be taken by CoP1, States via the General Assembly may also wish to consider establishing a Preparatory Commission that can start to lay the groundwork for key processes and decisions⁸¹.

IUCN hopes that this analysis can help contribute to discussions and priority setting at both the national and General Assembly level and we will continue to provide our expertise to support Parties in this next exciting era of ratification and implementation.

77 Gjerde, K.M. Clark, N.A. Chazot, C. Cremers, K. Harden-Davies, H. Kachelriess, D. Payne, C.R. Rodriguez-Chaves, M. Spadone, M. Thiele, T. Vierros, M. Goettsche-Wanli, G. and Wright, G. (2022) Getting beyond yes: fast-tracking implementation of the United Nations agreement for marine biodiversity beyond national jurisdiction. *npj Ocean Sustainability* (2022) 1:6 ; <https://doi.org/10.1038/s44183-022-00006-2>

78 Compare [UN Treaty Section Website](#): 66 UN Members States, one Non-Member Observer State and the European Union

79 Gjerde, K.M. Clark, N.A. Chazot, C. Cremers, K. Harden-Davies, H. Kachelriess, D. Payne, C.R. Rodriguez-Chaves, M. Spadone, M. Thiele, T. Vierros, M. Goettsche-Wanli, G. and Wright, G. (2022) Getting beyond yes: fast-tracking implementation of the United Nations agreement for marine biodiversity beyond national jurisdiction *npj Ocean Sustainability* (2022) 1:6

80 Idem.

81 Idem. and High Seas Alliance (2023) [How could a preparatory commission contribute to rapid and effective implementation of BBNJ?](#)

For more information, visit
<https://www.iucn.org/our-work/oceans-and-coasts>

For enquiries, please contact IUCN Ocean Team at
ocean@iucn.org

Citation: Kachelriess, D. (2023). *The High Seas Biodiversity Treaty: An Introduction to the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*. In M. Epps & C. Chazot (Eds.), (XXp). IUCN



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