

2023-10-03

Biodiversity Beyond National Jurisdiction – BBNJ

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Introduction

After over 15 years of United Nations negotiations on a new agreement on biological diversity beyond national jurisdiction (BBNJ), an agreement was finally concluded on the 4th of March 2023. The BBNJ agreement was formally adopted the 19th of June and opened for signature on 20th of September. This historic agreement – by some referred to as the Global Ocean Treaty and by others as the High Seas Treaty – profoundly develops the law of the sea and international environmental law in four different thematic areas:

1. marine genetic resources
2. area-based management tools (ABMTs) including marine protected areas (MPAs)
3. environmental impact assessments
4. capacity building and transfer of marine technology.

The agreement also provides undertakings in other areas and contains several principles and approaches which previously have not been included in international law treaties. This background paper provides an overview of the agreement and assesses its implications.

What type of agreement is it and how does it apply?

The BBNJ agreement is an international law treaty, negotiated under the auspice of the General Assembly of the United Nations. All states can become parties to the agreement. Once 60 states have formally ratified, it will enter into force and states that are parties to the agreement become legally bound implement its provisions.

Over 80 states have already become signatories. Whereas signing a treaty does not make the state legally bound to implement its obligations, it obliges states to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. Signature also indicates a willingness to ratify and become a party once necessary adjustments to legislation have been adopted by parliament and/or any other means of ratification prescribed under a country's laws. While it is promising that so many states already have signed the agreement, the challenges in implementing its undertakings domestically should not be underestimated. And since national

legislation must be in place in order to ratify a treaty, it may still be a few years until it enters into force.

Similar to other international law treaties, the agreement does not establish any obligations for non-parties. Its practical relevance will thus depend on whether or not it becomes a truly global agreement.

Where does it apply?

While the agreement is much dependent on the contribution of states, it does not apply within the sea areas which belong to the states or where states exercise sovereignty, jurisdiction and sovereign rights. Instead, the geographical scope of the BBNJ agreement is limited to the common ocean areas, where all states have the same rights and obligations. These areas beyond national jurisdiction represent a considerable part of the biosphere, 2/3 of the areal scope of the world's ocean and 95 per cent of its volume.

Put in legal terms, in the water column it applies beyond the exclusive economic zone of coastal states. This essentially means beyond a line measured 200 nautical miles from the coast. In areas where exclusive economic zones have not been declared, the agreement starts applying beyond the 12 nautical mile line of the territorial sea.

On the seabed and in the underlying sediments, the agreement applies beyond the continental shelves of coastal states, which in some cases extend further from the coast. The geographical scope of application is thus defined negatively, as the parts of the ocean and the seabed where the states do not exercise sovereign rights. A first problematic aspect of this definition is that it entails a dynamic scope. The extended continental shelf claims of many states are yet to be assessed, and in some areas, states have not proclaimed exclusive economic zones. This implies that the geographical scope is expected to shrink. A second problem is that the definition entails that where states have extended continental shelves it will result in a legal twilight zone, where the BBNJ agreement applies to the water column but not to the seabed. This will raise difficult issues for activities and decisions which have spill over effects between the water column and the seabed.

An attempt to close the legal gap of the ocean commons

While the BBNJ agreement is a self-standing international law treaty, it was negotiated within the more specific context of the law of the sea. In central provisions it refers to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), often referred to as the constitution for the oceans. Most importantly, the BBNJ agreement provides that it should be interpreted and applied in the context of and in a manner consistent with the Convention and that nothing in the Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention.

Although the BBNJ agreement is open for ratification also for states not parties to UNCLOS, it thus effectively functions as an implementing agreement to the latter. It can be considered as the third implementing agreement, preceded by the 1994 Implementing agreement on the Area and the 1995 United Nations Fish Stocks Agreement. While these two agreements were stringent in their scope, developing the rules on deep seabed minerals and management of migrating fish stocks respectively, the BBNJ agreement is considerably wider, representing a diverse set of issues and sectors, which are interconnected by the common geographic scope of the ocean's common areas. To understand the rationale behind packaging these elements into one treaty, it is necessary to seek the roots of the negotiation.

While UNCLOS largely has been considered as one of the most impressive achievements in treaty making and international law, it became apparent rather soon after its entry into force in 1994 that certain elements were lacking, in spite of its comprehensive ambition to provide rules for all uses of the seas. These perceived gaps came to form the package for the BBNJ negotiation. This package was itself the result of a compromise, and came to consist in equal parts of issues demanded by the global North and the global South. Throughout much of the negotiations, states came to be polarized along these lines.

Certain developed states considered that the environmental rules in the convention were insufficient. In particular, many thought these rules needed to be developed in order to enable a higher level of restriction in ecologically sensitive sea areas. Similarly, it was considered that a more rigorous process should be established to assess the environmental implications of human activities. From the perspective of developing states, it was considered deeply problematic that access to the genetic resources effectively was almost exclusively restricted to actors in rich countries, due to the costs and limited availability of the technology required. Connected to this, the same states demanded undertakings to ensure capacity building and transfer of marine technology. The final agreement represents an attempt to balance and live up to all these ambitions.

In its second article, the agreement sets out that its general objective is to ensure the conservation and sustainable use of marine biological diversity. In reality, the purpose of the agreement is broader and reflects the ambitions of both sides. Its de facto purpose can be divided into two parts: The BBNJ agreement is both an agreement to promote sustainable management of the parts of ocean where no state has jurisdiction, sovereignty and sovereign rights *and* an agreement to ensure a fairer and equitable distribution of profits and a more equal representation of developing states in the use of its resources. To understand the agreement, it is important to bear both these logics in mind and consider, that the final deal was the result of a negotiation where states had different interests and often held antagonist positions.

In addition to these two objectives, a third purpose, which is less explicit in the agreement text but underpins particularly its environmental commitments, is to promote a holistic management of the ocean commons. Because the central challenge in the management of the ocean commons areas is that while there are many organisations with mandates to regulate certain human activities, or to impose rules in certain regions, there is no structure for coordinating these organisations and promote common objectives. The BBNJ agreement sets out to prevent this fragmentation by providing an integrative process, where its conference of parties and different mechanisms set up under the agreement aims to ensure that different actors work collectively to promote its purpose. This is relevant in all agreement areas, but most obvious in relation to marine protected areas. Whereas the agreement provides a process to establish such measures, it does not have the legal mandate to impose restrictions on shipping, fisheries, mining and other maritime activities. Instead, it aims to bring the organisations which have mandates to regulate such uses onboard.

Accordingly, the agreement sets out that it should be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and the different global, regional, subregional and sectoral organisations which have a mandate to manage oceans and maritime activities. Instead, it aims to promote coherence and coordination with those instruments, frameworks and bodies. Throughout the agreement, there are obligations to consult relevant organisations and consider their opinions. In many regards, the success of the BBNJ agreement will depend on how successful it will be in promoting a more integrated management of the oceans. A hopeful sign is that many of the relevant organisations, such as the International Maritime Organisation and regional seas conventions have participated as

observers throughout the negotiations. There are however also areas with obvious risks of institutional tensions, particularly in the deep seabed, where the BBNJ agreement has a mandate to regulate biological diversity and genetic resources, and the International Seabed Authority has a general mandate in relation not only to marine minerals, but the deep seabed.

With this general background to the agreement in mind, the different parts of the agreement will now be discussed.

Marine genetic resources

Genetic resources is a central concept in the BBNJ Agreement. The term denotes living organisms, which are used not for direct consumption as food, but as a source for biotechnological development. The interest for these resources is connected to three factors. Firstly, marine life is generally much more genetically diverse than life on land. Secondly, life in the deep sea in particular is much less explored. Thirdly, the hostile conditions in the ocean-depths, including immense pressure and complete darkness, have made organisms develop properties that are not seen elsewhere. For these reasons, many have considered deep-sea organisms to hold particularly high potential to serve as inspiration for developing innovations. Particularly in the pharmaceutical field, many have assessed that so-called bioprospecting of deep-sea organisms may yield new medicines. So far, the number of commercial products developed based on deep-sea genetic resources is small. But based on the belief that considerable profits may be built on patenting and developing products based on biological properties from these ocean areas, developing states sought to establish a system that ensured that genetic resources of ocean commons would not be accessed and used without sharing part of the profits. Moreover, these states wanted to get technology and know-how to be able to break the unequal distribution of means to access and use the resources. Developed states on the other hand stressed the importance of not complicating scientific research. The polarization on this issue also connected to the interpretation of UNCLOS. While developing states considered that the convention prohibited private appropriation of genetic resources by virtue of the principle of common heritage of mankind, developed states interpreted this principle to apply only to deep-seabed minerals.

In the final agreement, states retain the possibility to freely access and use genetic resources. But the agreement also imposes a process aiming to ensure transparency on the use of marine genetic resources. As a spider in the web, an access and benefit-sharing mechanism (ABS) is established to function as focal point. Whenever any actor over which a state party exercises jurisdiction plans to undertake a mission to collect marine genetic resources *and* upon the return from such operations, the state is obliged to ensure that an extensive set of information is reported to the ABS. This includes for example information on geographical area, type of species targeted, and methods used. Similarly, states shall report how the genetic resource is used after collection, including resulting publications, patents and products. Particular requirements are also set for informed consent by indigenous peoples and local communities in cases where their traditional knowledge is used.

The collection of this information has a two-fold purpose. Firstly, it aims to promote transparency and innovation. Secondly, it enables the ABS to assess to what extents marine genetic resources are used, and if substantial profits are being made. Based on that information, the ABS can make a recommendation to the conference of parties on introducing a mandatory obligation to share monetary benefits from the use of genetic resources. But until such a decision is made, which requires qualified majority, the agreement imposes no tax on the use of genetic resources. Instead, developed states undertake to compensate developing states by

contributing to a special fund established under the agreement with an amount corresponding to 50 per cent of the budget of the agreement. The special fund will be utilized to fund capacity-building projects in developing states, including projects to promote biodiversity conservation.

Area-based management tools (ABMTs) including marine protected areas

As one of its central objectives, the BBNJ agreement establishes a process for establishing marine protected areas. This is closely connected to the political objectives established under Sustainable Development Goal 14 and the Kunming-Montreal Global Biodiversity Framework of the Convention on Biological Diversity to ensure that at least 30 per cent of the of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures.

The procedure for creating marine protected areas under the BBNJ agreement contains several steps. Firstly, criteria are set for identifying areas to protect. Formal requirements for proposals and for the consultation of relevant actors are also set, as well as for scientific assessment. Final decisions to establish marine protected areas, as well as management plans to achieve its objectives are made by the conference of parties. Such decisions should aim to be inclusive but may ultimately be made by qualified majority. Importantly, the conference of parties may decide to recommend measures which another organisation is mandated to adopt. This effectively implies that the BBNJ conference of parties can instruct other organisations to apply restrictions such as fisheries closures or routing measures for shipping. The relevant organisations are however free to refrain from taking such decisions. The functioning of the marine protected area process is thus highly dependent on institutional cooperation. While all parties to the agreement are bound by decisions to adopt marine protected areas, there are certain possibilities to opt out. There are also means to effectively fast-track decisions on marine protected areas which already have been decided by for example regional seas conventions, which in some cases, notably in the North-East Atlantic, have included areas beyond national jurisdiction in marine protected areas.

Environmental impact assessments

The procedure established for environmental impact assessments (EIA) under the BBNJ agreement is elaborate compared to corresponding rules in preceding environmental treaties. It maintains the same threshold for when assessments should be carried out as under the pre-existing UNCLOS rule. Accordingly, such procedures should be initiated when there are *reasonable grounds for believing* that planned activities under [the State's] jurisdiction or control *may cause substantial pollution of or significant and harmful changes* to the marine environment. But as a major development, the BBNJ agreement provides instrumental rules both for how to decide when an EIA is to be carried out, what procedure it should follow and what the report should contain. Importantly, this includes the consideration of cumulative impacts, thereby ensuring that the multitude of environmental stressors are considered.

Under the BBNJ agreement, it is sufficient that activities have *more than a minor or transitory effect* on the marine environment, or the *effects of the activity are unknown or poorly understood* for an obligation to arise for the state controlling the activity to conduct a screening. If the criteria provided for the screening process indicates that the threshold for EIA is met, the relevant state is obliged to carry out an assessment.

Similar to the rules on marine genetic resources, the procedure for environmental impact assessments gives the clearing-house mechanism a central role in promoting transparency by collecting and disseminating information from state parties, including when states consider that an EIA is not required. A pool of experts is also set up to provide assistance to states with capacity constraints. Similar to the rules on marine protected areas, the EIA rules provide an inclusive approach to consultation. States carrying out an EIA shall thus consider and respond to concerns expressed by other states. While the decision for determining if an activity is allowed to proceed remains with the state controlling the planned activity, it must take account of the EIA. Moreover, a decision to authorize the planned activity shall only be made when the state 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 on the marine environment. Parties are also obliged to monitor activities which they permit and report on impacts.

Another noteworthy development is that the BBNJ agreement provides for strategic impact assessments. Different to traditional EIAs, which focus on individual activities, strategic impact assessments should be carried out in relation to plans and programmes.

Capacity building and transfer of marine technology

Empowering developing states to both gain a more equal access to the resources of areas beyond national jurisdiction and implement the environmental obligations is a central element of the BBNJ agreement. First, Capacity Building and Transfer of Marine Technology is articulated as a cross-cutting theme to achieve the objectives laid out in the marine genetic resources, area-based management tools and environmental impact assessments sections. The agreement also provides a dedicated section with detailed rules setting up the forms and modalities for such cooperation. While there are undertakings to promote capacity building and technology transfer in other treaties, including UNCLOS, a novelty in the BBNJ agreement is that mechanisms for monitoring and evaluation are established. A specific committee is established to lead this work and report to the conference of parties. It appears that considerable resources will be devoted to these elements of the agreement. Not only the special fund established under the marine genetic resource regime is aimed to finance capacity building. There is also a voluntary trust fund. The Global Environmental Facility (GEF) has also set out to prioritize this work. Several private philanthropists have also indicated a willingness to contribute to fulfil the objects of the agreement.

Enforcement and dispute settlement

Since the BBNJ agreement by definition applies in areas where no state exercises territorial jurisdiction, it is challenging to ensure that states live up to their obligations. Monitoring and enforcement is also notoriously difficult, because of the high costs involved in operations far from the coasts. As a general rule, the agreement follows the traditional flag state principle in assessing what state is responsible for exercising jurisdiction. This makes it particularly important to include states which are big registrars for ships carrying out operations in areas beyond national jurisdiction.

As a binding treaty, the BBNJ agreement provides compulsory dispute settlement rules, which are modelled on the rules in UNCLOS. Although the agreement in many parts is cooperative in nature, states are thus ultimately able to judicially ensure that other parties fulfil its obligations.

Commissioned by SwAM

This paper was commissioned by the Swedish Agency for Marine and Water Management (SwAM), financed by the Swedish International Development Cooperation Agency (Sida)

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Financed by Sida, the Swedish International Development Cooperation Agency.



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