

Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement or Treaty)



Background

Following more than a decade of discussions convened under the United Nations General Assembly, in 2017 the Assembly decided to convene an Intergovernmental Conference (IGC) to elaborate the text of an internationally legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ), with a view to developing the instrument as soon as possible.

From 2018, an IGC on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) worked on a new agreement to address these threats. The IGC's negotiations focused on four elements of a package agreed to in 2011, namely:

- marine genetic resources, including benefit sharing considerations;
- area-based management tools, including marine protected areas;
- environmental impact assessments; and
- capacity building and the transfer of marine technology (CB&TT).

The IGC also addressed cross-cutting issues, including the principles and approaches governing the new instrument, financial and technical considerations, institutional arrangements, and dispute-settlement measures. Negotiations on the Agreement concluded successfully in early March 2023 and was adopted in June 2023 after a technical edit. The BBNJ Agreement is the third implementing agreement under UNCLOS, after the 1994 Agreement establishing the International Seabed Authority, and the 1995 Fish Stocks Agreement.

Principles in the Rio Declaration covered by the UNFCCC include:

- The polluter pays principle (Principle 16)
- The principle of the common heritage of humankind (Principle 1)
- The precautionary principle or approach (Principle 15)
- The use of relevant traditional knowledge of Indigenous Peoples and local communities (Principle 12)

Key provisions of the agreement

The BBNJ Agreement is comprised of 64 Articles separated into 12 parts, which can be summarised as follows:

Part I: General provisions (Articles 1–8), including its general objective in Article 2:

The objective of this Agreement 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.

Part II: Marine Genetic Resources, including the fair and equitable sharing of benefits (Articles 9–16)

The BBNJ Agreement aims to control the exploitation of marine genetic resources. It states that activities relating to marine genetic resources “are in the interest of all States and for the benefit of all humanity.” Accordingly, under the BBNJ Agreement, benefits arising from activities involving marine genetic resources and their associated “digital sequence information” (for example, DNA data)—which could be significant—must be shared fairly and equitably among States. This includes not only the sharing of scientific data, but also the sharing of financial gains through a financial mechanism established under the Agreement.

The BBNJ Agreement also imposes robust notification requirements prior to the collection, use, and commercialisation of marine genetic resources. For example, States must adopt measures to ensure that detailed information about a planned activity involving marine genetic resources is provided to a “clearing-house mechanism” (a centralized information platform) at least six months prior to collection.

Part III: Measures such as area-based management tools, including marine protected areas (Articles 17–26)

The BBNJ Agreement gives States the means to establish “area-based management tools” in the high seas and deep seabed. These are measures to manage human activities in areas specifically delimited for conservation purposes. They prominently include “marine protected areas,” where certain types of human activities, such as mining and shipping, are restricted.

To account for existing activities on the high seas, the BBNJ Agreement requires States to collaborate and consult with “relevant stakeholders,” including the “scientific community,” “Indigenous Peoples and local communities,” and the “private sector,” when formulating and assessing plans for area-based management tools. Area-based management tools established under the BBNJ Agreement will also have to respect existing measures of other international bodies. These include regulations of fishing, shipping, and deep-sea mining by regional fishery management organisations, the International Maritime Organization, and the International Seabed Authority.

Part IV: Environmental impact assessments (Articles 27–39)

The environmental impact assessment (EIA) provisions under the BBNJ Agreement require pre-authorisation assessments of the potential impacts on the high seas or deep seabed activities planned in those areas, which could include the exploitation of marine genetic resources, laying of submarine cables, and oil and gas exploration.

The Agreement details a four-stage process for conducting EIAs: (1) screening; (2) scoping; (3) impact assessment and evaluation; and (4) prevention, mitigation, and management of potential adverse effects. A screening must be conducted 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.” A full EIA is required if the screening shows that the planned activity “may cause substantial pollution of or significant and harmful changes to the marine environment.” The EIA must include a public notification and consultation process.

The BBNJ Agreement requires the preparation of a detailed EIA report, which must be made publicly available and which States must consider when deciding whether to authorise a planned activity. It further imposes a continuous obligation on States to monitor and periodically report on the environmental and associated effects of an authorised activity. In certain circumstances EIAs can be conducted in accordance with national laws or other applicable international instruments.

Part V: Capacity-building and the transfer of marine technology (Articles 40–46)

Under the BBNJ Agreement marine technology includes the equipment and expertise relevant to the conservation and sustainable use of marine biodiversity, including marine scientific research. The Agreement provides that States “shall cooperate” to assist each other, in particular developing States, in achieving the BBNJ Agreement’s objectives through capacity-building and the transfer of marine technology, including through partnerships with the private sector.

The Agreement establishes a special fund providing financial assistance to developing country Parties in implementing the treaty. The fund will be financed through annual contributions and financial gains made from the exploitation of marine genetic resources. Private entities may also make voluntary contributions to the fund.

Part VI: Institutional arrangements (Articles 47–51)

The BBNJ Agreement establishes a governing body called the Conference of the Parties (COP) with the obligation of keeping the implementation of Agreement under review and evaluation. A secretariat is established to provide administrative support to the COP and Parties.

A Scientific and Technical Body is established under the authority and guidance of the COP, to provide scientific and technical advice and report to the COP, perform the functions assigned to it under this Agreement and any other functions that may be decided by the COP.

The Agreement establishes a Clearing-house Mechanism (CHM) to serve as a centralised platform to enable Parties to access, provide and disseminate information with respect to activities taking place pursuant to the provisions of this Agreement. The secretariat has been assigned management responsibilities for the CHM.

Part VII: Financial resources and mechanism (Article 52)

The BBNJ Agreement establishes a financial mechanism for the provision of adequate, accessible, new and additional and predictable financial resources to assist developing country Parties to implement the Agreement, including through funding in support of capacity-building and the transfer of marine technology, as well as to perform other functions for the conservation and sustainable use of marine biological diversity.

The financial mechanism consists of: 1) a voluntary trust fund to facilitate the participation of vulnerable developing countries, including SIDS; 2) a special fund; and 3) the GEF trust fund. The special fund and the GEF trust fund have the purpose of supporting developing country Parties implement the Agreement.

Part VIII: Implementation and compliance (Articles 53–55)

The BBNJ Agreement establishes an Implementation and Compliance Committee to facilitate and consider the implementation of and promote compliance with the provisions of the Agreement.

The Implementation and Compliance Committee will be comprised of members possessing appropriate qualifications and experience nominated by Parties and elected by the COP.

Part IX: Settlement of disputes (Articles 56–61)

Part X: Non-Parties to this Agreement (Article 62)

Part XI: Good faith and abuse of rights (Article 63)

Part XII: Final provisions (Article 64)

Ratifying the BBNJ: reservations and declarations

Reservations are not explicitly prohibited in this agreement. However, under international law, a country ratifying or acceding to a treaty may make a declaration where they express their understanding of some matter or the interpretation of a particular provision. Unlike reservations, declarations merely clarify the country's position and do not modify the legal effect of a treaty. Usually, declarations are made at the time of ratification or signature.

Milestones in the negotiation of the agreement

Working Group: Established by General Assembly in 2004, the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ exchanged views on institutional coordination, the need for short-term measures to address illegal, unregulated, and unreported (IUU) fishing and destructive fishing practices, marine genetic resources (MGRs), marine scientific research on marine biodiversity, marine protected areas (MPAs), and environmental impact assessments (EIAs). It met three times between 2006 and 2010.

The “Package”: The fourth meeting of the Working Group (31 May–3 June 2011) adopted, by consensus, a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of BBNJ, by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS. The recommendations included a “package” of issues to be addressed in this process, namely:

- MGRs, including questions on benefit-sharing;
- area-based management tools (ABMTs), including MPAs;
- EIAs; and
- CB&TT.

A Legally Binding Instrument: Between 2014 and 2015, the Working Group engaged in interactive substantive debates on the scope, parameters, and feasibility of an international instrument under UNCLOS. At its ninth meeting, the Working Group reached consensus on recommendations for a decision to be taken at the 69th session of the UN General Assembly to develop a new legally binding instrument on BBNJ under UNCLOS, and to start a negotiating process to that end.

IGC-1: At the first meeting of the IGC, held 4–17 September 2018, delegates clarified positions on the package.

IGC-2: Delegates convened 25 March–5 April 2019 for the second session of the IGC. They deliberated based on the IGC President's Aid to Negotiations, which contained options structured along the lines of the 2011 package.

IGC-3: Delegates at the third session of the IGC convened 19–30 August 2019 and delved, for the first time, into textual negotiations based on a zero draft containing treaty text, developed by IGC President Lee. The document's structure addressed general provisions and cross-cutting issues, as well as the four elements of the 2011 package.

IGC-4: Delegates reconvened 7–18 March 2022 in an in-person informal-informal setting governed by Chatham-house rules. With COVID-19 restrictions only permitting two representatives per delegation in the room at one time and extremely limited observer participation, delegates addressed a revised draft text of the agreement. For the first time, delegations prepared and submitted textual proposals, many times jointly, to make progress.

IGC-5.1: The first part of IGC-5, which convened 15–26 August 2022, made notable progress in reaching agreement on some key issues. However, consensus could not be reached, and the session was suspended. Outstanding issues included: the establishment of an ABS mechanism; monetary benefit-sharing; intellectual property rights; decision-making; thresholds related to EIAs; and area- versus impact-based approaches.

IGC-5.2: The second part of IGC-5 convened 20 February–4 March 2023. After more than 36 hours in closed-door consultations to hammer out the final articles, lasting well into the weekend, IGC President Lee emerged with the text of an agreement. Delegates agreed to establish an open-ended informal working group to undertake technical edits to ensure uniformity of the text and harmonize the wording in all six UN official languages, requesting the working group to report to a further resumed session of IGC-5.

Parties to the agreement

The BBNJ will enter into force 120 days after its 60th ratification. Currently, two countries have ratified the BBNJ – Chile and Palau.

Nevertheless, the BBNJ has 88 signatories, which indicates the intent of countries to ratify it. Of these signatories, 22 of them are SIDS with 11 of them PSIDS (Cook Islands, Fiji, FSM, Nauru, Palau, RMI, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu).

Rules of procedure

The first meeting of the COP of the BBNJ has yet to be convened; therefore, the rules of procedure have been agreed to yet.

Institutional structures(s) supporting the agreement (indicative)

- COP
- Secretariat
- Financial Mechanism
- Scientific and Technical body
- Implementation and Compliance Committee



This factsheet on *Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement or Treaty)* features on pages 44–47 of the compilation report on *Multilateral Environmental Agreements (MEAs)*.