

FOUR TREATIES IN ONE:
THE BIODIVERSITY BEYOND NATIONAL JURISDICTION
AGREEMENT

By Daniel Bodansky¹

I. INTRODUCTION

Combine and conquer. That was the strategy of those seeking to develop an international regime to address marine biological diversity found in areas beyond national jurisdiction – areas that constitute half of the world’s surface and a much greater proportion of its habitable volume.² States had quite different visions for the regime. On the one hand, the European Union and other developed countries such as Australia and New Zealand wanted a conservation-oriented regime providing for the establishment of marine protected areas and setting rules for environmental impact assessments; on the other hand, developing countries wanted a resource-oriented regime that would allow them to get what they consider their fair share of the benefits of marine genetic resources and would assist them with capacity building and technology transfer. Only by combining these disparate topics in a single package was agreement possible.³

The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement)⁴ is the most important ocean agreement to be adopted in more than a quarter century and complements the Convention on Biological Diversity (CBD),⁵ which addresses biodiversity found within national jurisdiction. In essence, it constitutes four treaties in one, all addressing marine biological diversity in areas beyond national jurisdiction

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² CAITLIN KEATING-BITONI, CONG. RSCH. SERV., IF12283, THE BIODIVERSITY BEYOND NATIONAL JURISDICTION AGREEMENT (HIGH SEAS TREATY) (2023) [hereinafter CRS Report].

³ On combining issues to reach a negotiating outcome, see James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT’L ORG. 281 (1983).

⁴ 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, UN Doc. A.CONF/232/2023/4 (June 19, 2023) [hereinafter BBNJ Agreement].

⁵ Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79, art. 3 [hereinafter CBD].

(ABNJ), but each with its own objectives, principles, obligations and – in some cases – institutions:

- A treaty on marine genetic resources (MGRs), including fair and equitable benefit-sharing.
- A treaty on the establishment of area-based management tools (ABMT), including marine protection areas (MPAs).
- A treaty on environmental impact assessment (EIA).
- A treaty on capacity building and the transfer of marine technology (CBTMT).

The BBNJ Agreement has roots in both the law of the sea and international environmental law. It was adopted as the third implementing agreement under the United Nations Convention on the Law of the Sea (UNCLOS).⁶ As such, it fleshes out the Convention's barebones provisions on environmental impact assessment,⁷ capacity building, and technology transfer, as they relate to the high seas;⁸ replicates the Convention's dispute resolution system; and draws on the Convention's jurisdictional rules and principles.

But in many respects, the BBNJ Agreement more closely resembles multilateral environmental agreements (MEAs) such as the CBD or the UN Convention on Climate Change. Like MEAs, it is intended to be a dynamic agreement that evolves in response to new information and circumstances. Like MEAs, it establishes a variety of institutions to implement and elaborate its provisions, including a conference of the parties, a scientific and technical body, a clearing-house mechanism, an implementation and compliance committee, and a financial mechanism.

Negotiating four treaties in one raised many difficult issues. Some are familiar from multilateral environmental negotiations, such as the North-South debates about equity, technology transfer, and finance. Others are specific to the law of the sea, such as which UNCLOS principle governs MGRs from areas beyond national jurisdiction: the common heritage of humankind or freedom of the high seas?

Given the multitude and complexity of issues involved, the BBNJ Agreement was long in the making. Even after the package of topics to be addressed was agreed in

⁶ United Nations Convention on the Law of the Sea, March 3, 1986, 1883 UNTS 3 [hereinafter UNCLOS]. The other two implementing agreements are the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, July 28, 1994, 1836 UNTS 3, and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 UNTS 3 [hereinafter Fish Stocks Agreement].

⁷ UNCLOS, *supra* note 6, at art. 206.

⁸ *Id.* part XIV.

2011, the Agreement still took another dozen years to complete: four years of discussions in an ad hoc working group, two years of preparatory committee meetings, and six years of negotiations in an intergovernmental conference, ending in thirty-six continuous hours of negotiations. Until well along in this process, some countries, including the United States, argued that BBNJ could be adequately addressed under existing agreements and did not require negotiating a new treaty. Even now, the negotiations are still unfinished, since the BBNJ Agreement left many (in some cases, devilish) details to its conference of the parties.

The outcome of this tortuous process – the BBNJ Agreement – is widely considered a diplomatic triumph.⁹ As a negotiating exercise, the praise is well deserved. Given the number and variety of issues involved, the widely disparate views among states, and the cross-cutting alliances among them, achieving consensus required enormous skill and perseverance.

But the significance of the BBNJ Agreement is more uncertain. Developing countries hoped that it would recognize MGRs from areas beyond national jurisdiction as part of the common heritage of humankind, subject to international management and benefit sharing. The Agreement provides for some specified types of benefit sharing, but without linking benefit sharing to the common heritage principle, which it lists along alongside its opposite, freedom of the high seas, without choosing between them. Meanwhile, environmentalists hoped that the Agreement would provide a unifying framework for the conservation and sustainable use of high seas biodiversity, which is currently fragmented among a multitude of agreements and institutions with different memberships, geographic scopes, and subject matters. The BBNJ Agreement includes a nod in that direction, saying that it should be interpreted and applied in a manner that “promotes coherence and coordination” (art. 5). But, in general, those who wanted to preserve the decision-making authority of existing agreements and institutions prevailed. As a result, the Agreement’s ability to bring greater coherence to the governance of BBNJ may depend more on its soft influence than its legal authority, as well as on how it is elaborated going forward.

II. BACKGROUND

Roughly half of the earth’s surface, 2/3 of the ocean’s surface, and 95% of the ocean’s volume lie in areas beyond national jurisdiction.¹⁰ As of 2022, more than

⁹ See, e.g., Stewart Patrick, *The High Seas Treaty Is an Extraordinary Diplomatic Achievement*, Carnegie Endowment for International Peace (March 8, 2023).

¹⁰ CRS Report, *supra* note 2; International Union for Conservation of Nature [IUCN], *High Seas*, at <https://www.iucn.org/our-work/topic/high-seas>.

225,000 marine species had been identified,¹¹ but knowledge of marine biodiversity is quite limited, so potentially many more species may be found. Only about 5% to 20% of the ocean has been explored.¹² In recent years, an average of 2000 new marine species have been discovered annually and estimates of the total number of marine species range from 500,000 to 1,000,000.¹³ Of particular importance to marine biodiversity are a number of exceptionally species-rich “hotspots”, such as IUCN’s ten so-called “ocean gems.”¹⁴

Marine biodiversity is impacted by a host of human-related causes, including shipping, fishing, pollution, climate change, and ocean acidification. By one estimate, only about 13% of the ocean remains “truly wild.”¹⁵ More than 190 multilateral and bilateral agreements have been adopted relevant to the protection of marine biodiversity,¹⁶ including, among others:

- UNCLOS, which establishes general duties to conserve marine living resources protect and to preserve the marine environment.¹⁷
- The CBD, which has established a process to identify “ecologically or biologically significant marine areas” (EBSAs).¹⁸
- The International Convention for the Regulation of Pollution from Ships (MARPOL),¹⁹ which regulates vessel-source pollution, including garbage and sewage.

¹¹ Marta Fava, *What Is Ocean Biodiversity* (UNESCO, June 7, 2022), at <https://oceanliteracy.unesco.org/ocean-biodiversity/>.

¹² Compare *id.* (“5% of the ocean has been explored and documented”) with National Oceanic and Atmospheric Administration [NOAA], *How Many Species Live in the Ocean?*, at <https://oceanservice.noaa.gov/facts/ocean-species.html> (“more than eighty percent of our ocean is unmapped, unobserved, and unexplored”).

¹³ Ward Appeltans et al., *The Magnitude of Global Marine Species Diversity*, 22 *CURRENT BIOLOGY* 2189, 2192 (2012).

¹⁴ IUCN, *High Seas Gems: Hidden Treasures of Our Blue Earth* (2008), at https://www.iucn.org/sites/default/files/import/downloads/high_seas_gems_booklet_finaloct08.pdf.

¹⁵ David Freestone, *The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges*, in *CONSERVING BIODIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION* 4 (David Freestone ed., 2019).

¹⁶ Emanuele Bigagli, *The International Legal Framework for the Management of the Global Oceans Socio-Ecological System*, 68 *MARINE POL’Y* 155, 157 (2016).

¹⁷ UNCLOS, *supra* note 6, at arts. 117-119, 192.

¹⁸ CBD, *Ecologically or Biologically Significant Marine Areas*, at <https://www.cbd.int/ebsa/>. Since 2008, a scientific expert process under the CBD has identified more than three hundred EBSAs.

¹⁹ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 *UST* 3407, 12 *ILM* 1319, amended by Protocol of 1978, Feb. 17, 1978, 1340 *UNTS* 61.

- Treaties establishing regional fisheries management organizations (RFMOs) and similar bodies, through which Parties manage marine fisheries, including on the high seas.²⁰
- The Convention on International Trade in Endangered Species (CITES),²¹ which protects species (including marine species) threatened by international trade.
- The World Heritage Convention, which allows the creation of World Heritage Sites for “precisely delineated natural areas of outstanding universal value from the point of view of science, conservation, or natural beauty.”²²
- The UNEP Regional Seas Program²³ and associated regional agreements, four of which currently include ABNJ within their geographical coverage.²⁴
- Species-specific agreements such as the International Convention for the Regulation of Whaling.²⁵

Despite this multitude of agreements, significant gaps exist in the governance of BBNJ.²⁶ For example:

- There are no rules governing use of marine genetic resources of ABNJ, since the CBD’s Nagoya Protocol on access and benefit-sharing applies only to genetic resources from areas within national jurisdiction.²⁷
- There is no global process to establish marine protected areas or other area-based management tools on the high seas.
- There is no mechanism to address the cumulative impacts of human activities on the marine environment of areas beyond national jurisdiction.

²⁰ Rosemary Rayfuse, *Regional Fisheries Management Organizations*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 439 (Donald R. Rothwell et al. eds., 2015).

²¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 UNTS 243.

²² Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 UNTS 151, art. 2; see David Freestone et al., *World Heritage in the High Seas: An Idea Whose Time Has Come*, World Heritage Reports 44 (2016).

²³ United Nations Environment Programme, *Regional Seas Programme*, at <https://www.unep.org/topics/ocean-seas-and-coasts/regional-seas-programme/regional-seas-programme>.

²⁴ Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 2354 UNTS 67 [hereinafter OSPAR]; Convention for the Protection of Natural Resources and Environment of the South Pacific Region, Nov. 24, 1986, 26 ILM 38; Convention for the Protection of Mediterranean Sea Against Pollution, Feb. 16, 1976, 1102 UNTS 45; Convention for the Protection of the Marine Environment and Coastal Areas in the South-East Pacific, Nov. 12, 1981.

²⁵ International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 UNTS 72.

²⁶ See generally Giovanni Ardito et al., *Overlapping and Fragmentation in the Protection and Conservation of the Marine Environment in Areas Beyond National Jurisdiction*, 9 FRONTIERS MARINE SCI. 1094266 (2023); Guillermo Ortuño Crespo et al., *High-Sea Fish Biodiversity Is Slipping through the Governance Net*, 3 NATURE ECOLOGY & EVOLUTION 1273 (2019).

²⁷ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, Oct. 29, 2010, 3008 UNTS 3.

- There are no uniform standards or guidelines for conducting environmental impact assessments of activities that occur within or impact areas beyond national jurisdiction.
- There is no framework for capacity building and the transfer of marine technology specific to the conservation and sustainable use of BBNJ.

The BBNJ Agreement is intended to fill these gaps and provide a more comprehensive framework of international governance for the conservation and sustainable use of BBNJ.

III. HISTORY

Protecting biodiversity of areas beyond national jurisdiction has been a topic of international discussion for more than twenty years. In 2004, the United Nations General Assembly (UNGA), took an initial step to address it, creating an Ad Hoc Informal Open-Ended Working Group on the conservation and sustainable use of BBNJ, which began meeting in 2006.²⁸ That same year, the EU first expressed support for negotiation of an implementing agreement on BBNJ under UNCLOS.²⁹

In 2011, the Ad Hoc Working Group made a major breakthrough, agreeing to the package of four issues that ultimately became the basis for the BBNJ Agreement.³⁰ But although agreement on the 2011 package has been called a “watershed moment,”³¹ it did not lead directly to treaty negotiations, due to the position of some countries (including the United States, Canada, Japan, Iceland, and Russia) that existing agreements adequately addressed BBNJ and that a new treaty was therefore unnecessary and could undermine high seas freedoms and regional fisheries organizations.

In 2015, UNGA decided to establish a Preparatory Committee (Prepcom) to make recommendations on possible elements of an international legally binding instrument on BBNJ, addressing the issues in the 2011 package, but on the understanding that the new instrument “should not undermine existing relevant legal instruments and framework and relevant global, regional, and sectoral bodies.”³² Two years later,

²⁸ G.A. Res. 59/24, Oceans and the Law of the Sea, para. 73 (Nov. 17, 2004).

²⁹ Glen Wright et al., *The Long and Winding Road: Negotiating a Treaty for the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction*, IDDRI, Studies No. 8/18, at 41 (2018).

³⁰ Recommendations of the 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, UN Doc. A/66/119, annex, at para. 1(b) (June 30, 2011).

³¹ Wright et al., *supra* note 29, at 41.

³² G.A. Res. 69/292, paras. 1-3 (June 19, 2015).

UNGA established an intergovernmental conference (IGC) to negotiate the new BBNJ instrument.³³

But agreement to develop an international legally binding instrument did not signify agreement on what the instrument should provide. States differed on a huge variety of issues, both large and small. Developed and developing countries disagreed about whether MGRs from areas beyond national jurisdiction are part of the “common heritage of mankind,” as well as about whether funding, capacity building, and technology transfer should be mandatory or voluntary. Countries such as Iceland and Russia that preferred addressing BBNJ in existing regional and sectoral bodies sought to protect the authority of these bodies. And states struggled with the multitude and complexity of more specific issues raised by the four topics under negotiations: How to define ABMTs and EIAs? How decisions should be made about ABMTs? What should be the trigger for EIAs? What should be the rights of adjacent states, which are likely to be most affected by activities on the high seas? The list could go on and on.

Not surprisingly, then, work in both the Prepcom and the IGC proceeded slowly. The Prepcom made only modest progress in its four sessions in 2016 and 2017.³⁴ And the first two sessions of the IGC were essentially an extension of the Prepcom, with states expressing their views but no negotiating text to work with. In September 2018 at IGC-1, the newly elected IGC president, Rena Lee of Singapore (referred to by some as the “mother of BBNJ”), lacking a mandate to prepare a zero draft, simply circulated a set of questions and discussion topics to countries as an “aid to discussions.”³⁵ For IGC-2, held in spring 2019, she circulated a more detailed “aid to negotiations” that set forth options for textual elements of an agreement.³⁶ Only after IGC-2 was Lee authorized to prepare a zero draft,³⁷ which she circulated in May 2019 and which served as the basis for negotiations at IGC-3 in August 2019.

³³ G.A. Res. 72/249, para. 2 (Dec. 24, 2017).

³⁴ Report of the Preparatory Committee Established by G.A. Res. 69/292, UN Doc. A/AC.287/2017/PC.4/2 (July 31, 2017).

³⁵ President’s Aid to Discussions, A/CONF.232/2018/3 (June 25, 2018). On IGC-1, see Rachel Tiller et al., *The Once and Future Treaty: Towards a New Regime for Biodiversity in Areas Beyond National Jurisdiction*, 99 MARINE POLICY 239 (2019).

³⁶ President’s Aid to Negotiations, UN Doc. A/CONF.232/2019/1 (Dec. 3, 2018). On IGC-2, see Elizabeth Mendenhall et al., *A Soft Treaty, Hard to Reach: The Second Inter-Governmental Conference for Biodiversity Beyond National Jurisdiction*, 108 MARINE POL’Y 103664 (2019).

³⁷ Draft Text of an 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, UN Doc. A/CONF.232/2019/6 (May 17, 2019).

According to observers, the introduction of a draft text “substantially changed the tenor, pace, and detail of interventions compared with the first two meetings.”³⁸ Prior to IGC-3, the IGC had met in plenary, taking up each of the four elements of the package seriatim. At IGC-3, the organization of the meetings changed, with greater use of “informal-informals,” organized along the lines of the four parts of the package deal, which met in parallel and operated without translation.³⁹

Throughout 2020 and 2021, the formal negotiations had to halt due to the COVID pandemic. But an informal, Track 1.5 “High Seas Treaty Dialogue” continued to meet online,⁴⁰ and President Lee also organized several online sessions, allowing states to consider more fully the issues involved in the negotiations and their interrelationships.⁴¹ When the formal negotiations finally resumed in March 2022, IGC-4 had a better tone. Nevertheless, it was able to make only limited progress on the text, with states continuing to disagree about a host of issues.⁴²

The IGC’s negotiating mandate provided initially for four sessions.⁴³ But IGC-4 ended with “still a great distance to go” to finalize the treaty.⁴⁴ As a result, the UN General Assembly authorized a fifth negotiating session, held in August 2022, during which the final agreement began to take shape. In addition to informal-informals, the President initiated a “homework group” model at IGC-5, in which small groups were sent off to resolve particular issues.⁴⁵ Although many technical issues were resolved through this process,⁴⁶ the session ended without reaching breakthroughs on such core issues as whether the common heritage of humankind principle applies to MGRs from areas beyond national jurisdiction; whether to provide for mandatory monetary benefit-sharing from the use of MGRs; the powers and voting rules of the conference of the parties; its authority to adopt management measures for ABMTs that are within

³⁸ Elizabeth M. De Santo et al., *Stuck in the Middle with You (and Not Much Time Left): The Third Intergovernmental Conference on Biodiversity Beyond National Jurisdiction*, 117 MARINE POL’Y 103957, 103958 (2020).

³⁹ *Id.*

⁴⁰ The High Seas Treaty Dialogue was spearheaded by Gina Torre of the International Center for Dialogue and Peacebuilding, with the support of Belgium, Monaco, Costa Rica, and the High Seas Alliance, a consortium of 50+ non-governmental members and IUCN. See <https://icdpb.org/high-seas-treaty-dialogues/>.

⁴¹ See generally Alice B.M. Vadrot et al., *Marine Biodiversity Negotiations During COVID-19: A New Role for Digital Diplomacy?* 21 GLOBAL ENVTL. POL. 169 (2021) (utility of online dialogue uncertain).

⁴² Elizabeth Mendenhall et al., *Direction Not Detail: Progress Towards Consensus at the Fourth Intergovernmental Conference on Biodiversity Beyond National Jurisdiction*, 146 MARINE POL’Y 105309, 105311 (2022).

⁴³ G.A. Res. 72/249, *supra* note 33, at para. 3.

⁴⁴ Mendenhall et al., *supra* note 42, at 103965.

⁴⁵ Rachel Tiller et al., *Shake It Off: Negotiations Suspended, But Hope Simmering, After a Lack of Consensus at the Fifth Intergovernmental Conference on Biological Diversity Beyond National Jurisdiction*, 148 MARINE POL’Y 105457, at 3 (2023).

⁴⁶ *Id.* (draft provisions that included options reduced from 29 to 10).

the competence of regional or sectoral bodies; how easily to trigger EIAs; and whether EIAs should be required for activities that take place in areas within national jurisdiction that impact areas beyond national jurisdiction.

To avoid convening a sixth session, the President Lee instead suspended IGC-5, and a resumed session (dubbed IGC-5bis) was held from February 20 to March 3, 2023. Agreement continued to prove elusive, however, with new issues emerging, such as how to deal with disputed territories like the South China Sea. In the waning hours of IGC-5bis, with the negotiations on the brink of collapse, some delegates flew home not knowing whether there would be an outcome. But in thirty-six straight hours of negotiation on that final “day,” Lee was able to facilitate agreement on a deal, allowing the IGC to declare victory on March 4 and formally close the negotiations.⁴⁷ The BBNJ Agreement was adopted on June 19, 2023, at a further resumed IGC-5, after the text had been scrubbed and translated into the other five United Nations official languages. It was opened for signature on September 20, 2023, and, as of December 23, 2023, had been signed by 84 countries, including the United States.

IV. GENERAL PROVISIONS

The BBNJ Agreement comprises four largely independent parts addressing marine genetic resources, area-based management tools, environmental impact assessment, and capacity building and technology transfer, which were negotiated, at the end, in parallel in separate groups. In addition, a fifth negotiating group focused on the Agreement’s general provisions, including its scope of application, objectives, principles and approaches, institutions, dispute resolution system, and final clauses.

1. *Scope of application*

As an implementing agreement to UNCLOS, the BBNJ Agreement uses UNCLOS’s definitions and jurisdictional rules in delineating its geographic scope of application (“areas beyond national jurisdiction”⁴⁸), which Article 1(2) defines as including both the high seas and the “Area” – that is, the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.⁴⁹

⁴⁷ Elizabeth Mendenhall, Rachel Tiller & Elizabeth Nyman, *The Ship Has Reached the Shore: The Final Session of the “Biodiversity Beyond National Jurisdiction” Negotiations*, 155 MARINE POLICY 105686 (2023).

⁴⁸ BBNJ Agreement, *supra* note 4, at art. 1(2).

⁴⁹ UNCLOS, *supra* note 6, at art 1(1)(1) (defining the “Area”).

2. *Objective*

Article 2 defines the objective of the Agreement as “ensur[ing] the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction for the present and in the long run.” Throughout the Agreement “conservation” and “sustainable use” appear as a pair,⁵⁰ reflecting the Agreement’s overarching balance between environmental and developmental purposes.

3. *General principles and approaches*

In contrast to multilateral environmental agreements such as the Minamata and Stockholm Conventions,⁵¹ which do not contain a “principles” article, the BBNJ Agreement includes an extensive list of “general principles and approaches” to guide Parties in achieving the Agreement’s objectives (art. 7). The question of which principle from UNCLOS to include was the most contentious issue in the “principles and approaches” article and arguably the entire agreement: the common heritage of humankind⁵² or freedom of the high seas. Developing states pushed to recognize MGRs from areas beyond national jurisdiction as part of the common heritage of humankind, like the mineral resources of the deep seabed, use of which may be regulated and the benefits of which all countries are entitled to share. In contrast, developed states stressed freedom of the high seas, including freedom of marine scientific research, which allows actors to collect MGRs and use them as they wish. Ultimately the issue was sidestepped by simply including both principles, without any discussion of the relationship between the two or their implications for BBNJ.⁵³

The article’s title, “general principles and approaches,” reflects, in part, the longstanding concern of the United States that the term “principle” is interpreted by some to mean a general principle of international law⁵⁴ and that the items enumerated in the article (in particular, “precaution”) are better viewed as non-legal “approaches.” Accordingly, Article 7(e) refers to the “precautionary principle or precautionary approach, as appropriate.” The article also includes the principle of equity (but not the more familiar “principle of common but differentiated responsibilities” found in

⁵⁰ *E.g.*, BBNJ Agreement, *supra* note 4, at arts. 7(k), 8(1), 9(a), 11(6), 14(1), 22(4), 40(c), 47(6)(c), 51(3)(e), 52(3).

⁵¹ Minamata Convention on Mercury, Oct. 10, 2013, 55 ILM 582; Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 UNTS 119.

⁵² *See generally* John E. Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, 40 *Denv. J. Int’l L. & Pol’y* 447 (2011). “Common heritage of *humankind*” is an update of the UNCLOS formulation, “common heritage of *mankind*.”

⁵³ To guard against the implication that the reference to the common heritage of humankind in Article 7(b) might be interpreted to mean that BBNJ is part of the common heritage of humankind, the reference is qualified by the clause, “which is set out in the Convention.”

⁵⁴ *See, e.g.*, Lavanya Rajamani et al., *National “Fair Shares” in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law*, 21 *CLIMATE POL’Y* 983 (2021).

many MEAs), the polluter-pays principle, the use of the best available science and scientific information, and a suite of provisions focusing on particular groups (Indigenous Peoples, local communities, small island developing states, and landlocked developing states).

4. *Institutions*

Like other multilateral environmental agreements, the BBNJ Agreement creates a variety of institutions to elaborate, operationalize, and implement its provisions.

Conference of the parties (COP). In contrast to UNCLOS, the BBNJ Agreement establishes a COP with significant substantive decisionmaking authority, including to adopt modalities for sharing the monetary benefits from the utilization of MGRs (art. 14(7)), establish marine protected areas and other ABMTs (art. 23(2)), adopt standards and guidelines for EIAs (art. 38), request advisory opinions from the International Tribunal for the Law of the Sea (art. 47(7)), and assess the adequacy and effectiveness of the Agreement at regular intervals, beginning within five years of entry into force (art. 47(8)).⁵⁵ The BBNJ COP arguably represents an improvement over the climate change COP in two respects: first, it will meet in one place (art. 47(3)) rather than move from one region to another, providing greater continuity; second, if efforts at consensus fail, it can make decisions by qualified majority vote (two-thirds, except where otherwise provided), rather than require consensus (art. 47(5)).

Clearing-House Mechanism. Building on the example of the Convention on Biological Diversity, the BBNJ Agreement establishes a Clearing-House Mechanism that plays a key role throughout the Agreement in promoting transparency and disseminating information (art. 51(3)).

Scientific and Technical Body (STB). The Agreement establishes a Scientific and Technical Body with limited, expert membership – like the scientific expert groups established by MEAs such as the Rotterdam and Stockholm Conventions⁵⁶ but with wider responsibilities. The STB plays a primarily advisory role, advising the COP on proposed ABMTs (art. 20), emergency measures (art. 24(3)), and possible standards or guidelines for EIAs, and making comments to Parties on their draft environmental impact assessments (art. 33(4)).

Financial mechanism. As in many MEA negotiations, a key issue was whether to establish a new fund. The BBNJ Agreement establishes a financial mechanism (art.

⁵⁵ For a catalogue of the powers and functions of the COP, see Mendenhall, *supra* note 47, at 8, Table 2.

⁵⁶ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2244 UNTS 337; Stockholm Convention, *supra* note 51.

52(3)) and provides that it shall include both an existing fund – the Global Environment Facility (GEF) – as well as a new special fund (art. 52(4)). The special fund will operate under the authority and guidance of the COP (art. 52(9)) and provide assistance to developing country Parties on the basis of need (art. 52(12)). The COP is to determine an initial mobilization goal through 2030 from all sources, both public and private. But, in any event, the special fund has a dedicated source of revenue from the guaranteed contributions of developed country parties under the monetary benefit-sharing provision of the MGR section (art. 14(6)), discussed below.

Implementation and Compliance Committee. The Agreement establishes an Implementation and Compliance Committee (art. 55), modeled on the committee of the same name operating under the Paris Agreement on climate change.⁵⁷ As is true of the Paris Agreement committee and similar committees under other MEAs, the BBNJ committee is to be facilitative rather than punitive in nature, reflecting the “managerial” rather than the “enforcement” model of compliance.⁵⁸

Specialized institutions. Finally, the BBNJ Agreement establishes two specialized institutions:

- *An access and benefit-sharing committee*, which has an advisory role to the COP in recommending guidelines for MGR activities and developing monetary benefit-sharing rates or mechanisms (art. 15).
- *A capacity building and transfer of marine technology committee* to assess and review needs, identify and mobilize funds, and monitor and review implementation (arts. 45(2), 46).

5. *Dispute settlement*

Part IX of the BBNJ Agreement replicates the dispute settlement system of UNCLOS, with some minor adjustments to take account of the fact that the BBNJ Agreement is open to states that are not parties to UNCLOS (art. 60(5)-(7)).

6. *Entry into force*

The BBNJ Agreement requires ratification by sixty states to enter into force (art. 68(1)). Before then, states may provisionally apply the Agreement (art. 69).

⁵⁷ Christina Voigt, *The Compliance and Implementation Mechanism of the Paris Agreement*, 25 REV. EUR., COMP. & INT'L ENVTL. L. 161 (2016).

⁵⁸ DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 235-38 (2009)

V. MARINE GENETIC RESOURCES

The section on governance of marine genetic resources (MGRs) was perhaps the most difficult in the BBNJ negotiations and the one with the strongest North-South dimension. Marine genetic resources are potentially extremely valuable. As early as the 1960s, scientists showed that bioactive compounds from Caribbean sponges had anti-cancer and anti-viral qualities, and scientists believe that MGRs potentially have a wide range of uses in medicines, insecticides, industrial processes, and cosmetics, among other things.⁵⁹ But most of the research to date has focused on MGRs found within national jurisdiction, and patents based on MGRs generally involve organisms that are found both within and beyond areas of national jurisdiction.⁶⁰ So the value of MGRs in ABNJ remains uncertain, and commercialization of products made from MGRs remains a long way off. Developed countries have most of the technical capacity to research and utilize MGRs found in areas beyond national jurisdiction and wanted to protect their freedom to do so. Meanwhile, developing countries wanted to ensure in advance that they get their fair share of any future benefits.

In contrast to the other sections of the BBNJ Agreement, which are addressed by a variety of existing international agreements, frameworks, and bodies (IFBs), no governance arrangements currently exist for MGRs found on the high seas. The BBNJ negotiations were, of course, not the first to address the general issue of access to and benefit-sharing of genetic resources. The issue is also addressed in the CBD and its Nagoya Protocol, as well as the International Treaty on Plant Genetic Resources for Food and Agriculture.⁶¹ But these agreements apply only to genetic resources found in areas within national jurisdiction, and the approach they take – namely, to recognize the sovereign right of states to limit access and negotiate the terms of benefit-sharing for genetic resources found within their jurisdiction – could not be used in the BBNJ Agreement, which addresses genetic resources found in areas that have no sovereign.

The problem in the BBNJ negotiations was that states could not agree on an alternative. Developing states pushed to recognize MGRs as part of the common heritage of humankind, like the mineral resources of the deep seabed. In contrast, developed states stressed freedom of marine scientific research, including freedom to collect and use MGRs. At a meta-level, this debate over the status of MGRs was a familiar one, pitting developing countries, who wanted to ensure that they share in the

⁵⁹ David Leary et al., *Marine Genetic Resources: A Review of Scientific and Commercial Interest*, 33 MARINE POL'Y 183, 185 (2009)

⁶⁰ Paul Oldham et al., *Valuing the Deep: Marine Genetic Resources in Areas Beyond National Jurisdiction*, UK Dept. for Env't & Rural Affairs (2014).

⁶¹ November 3, 2001, 2400 UNTS 303.

benefits of marine genetic resources, against developed countries, who wanted to ensure that research and innovation were not stifled by burdensome rules on access and benefit-sharing.

When something is a matter of principle, compromise is difficult if not impossible. Often, the solution is to sidestep the dispute over principles and instead focus on what concrete specific rules to adopt. That was the approach taken in the BBNJ Agreement. It references both principles – common heritage of humankind and freedom of marine scientific research – allowing each side to point to the principle they like, and then sets forth rules on collection and benefit-sharing of MGRs that strike a balance between the objectives of fair and equitable benefit-sharing (art. 9(a)), on the one hand, and generation of knowledge, scientific understanding, and technological innovations, on the other (art. 9(c)). For example,

- As a middle ground between establishing a permitting scheme (as advocated initially by some developing countries) and not regulating collection at all (as some developed states wanted), the Agreement does not restrict MGR collection, but requires that collection be carried out with “due regard” for the interests of other states (art. 11(3)) and requires notifications to the Clearing-House Mechanism both pre- and post-cruise (art. 12).⁶²
- The BBNJ Agreement requires parties to ensure that MGRs and digital sequence information (DSI) be deposited in publicly accessible repositories and databases (art. 14(3)), but permits databases to impose “reasonable conditions” on access (art. 14(4)), allows actors to preserve the confidentiality of information (art. 51(6)), and does not limit intellectual property rights.
- The MGR section provides for both non-monetary and monetary benefit-sharing (art. 14), but defers the issue of whether to establish any type of royalty system on profits from MGRs and does not establish a mechanism to track the provenance of DSI in order to determine which information can be traceable to MGRs from ABNJ, which many scientists argued would make research almost impossible, given the ways that DSI is used.

A major issue in the MGR negotiations was whether to address not only MGR materials, fondly referred to as “wet stuff”, but also the digital sequence information obtained from MGRs (“dry stuff”). The Nagoya Protocol and the International Treaty on Plant Genetic Resource do not encompass the informational aspects of MGRs, and several countries, including the United States, vigorously opposed their inclusion in the BBNJ Agreement. But after Parties to the CBD decided in December 2022 to

⁶² Mendenhall et al., *supra* note 42, at 3.

begin developing a DSI regime,⁶³ the die was cast for the inclusion of DSI in the MGR section (art. 10(1)).⁶⁴

The MGR regime has three principal components. First, as noted above, it ensures transparency about the collection process by requiring notifications to the Clearing-House Mechanism both pre- and post-cruise, and by requiring the Clearing-House Mechanism to issue a standardized batch identifier so that MGRs collected in areas beyond national jurisdiction can be subsequently identified as such (art. 12(1)-(5)). Moreover, if the MGRs are ever utilized (including commercially), the utilizers must provide information on patents (if available and to the extent possible) and sales (if available) (art. 12(8)). Second, the MGR section requires parties to ensure that MGRs and DSI are deposited in publicly accessible repositories and databases (art. 14(3)). Third, it provides for non-monetary and monetary benefit sharing.

With respect to scope, the MGR regime applies retroactively to utilization of MGRs and DSI collected or generated before entry into force of the Agreement, unless a Party submits a written exemption when ratifying (art. 10(1)). But it excludes fishing and fishing-related activities (except when the fish are utilized as MGRs rather than food) to avoid burdening them with extensive pre- and post-cruise notification requirements (art. 10(2)).

The sharing of non-monetary benefits from MGR and DSI was relatively uncontroversial,⁶⁵ but monetary benefit-sharing was a major issue in the negotiations. States disagreed as to whether the agreement should:

- Provide for monetary benefit-sharing at all?
- If so, whether it should be voluntary or mandatory?
- How long monetary benefit-sharing should persist? For example, if MGRs or DSI are commercialized, should there be monetary benefit-sharing of the commercial profits?

As a compromise between those who supported royalty payments on the commercial benefits derived from MGRs and DSI and those who opposed monetary benefit-sharing altogether, the Agreement requires developed states initially to contribute a fixed amount equal to half of (and in addition to) their assessed contribution to the Agreement's administrative budget (art. 14(6)). This mandatory, guaranteed funding is important, because it is unclear when, if ever, MGRs and DSI from areas beyond

⁶³ Digital Sequence Information on Genetic Resources, CBD Decision 15/9, UN Doc. CBD/COP/DEC/15/9 (Dec. 19, 2022).

⁶⁴ As in the CBD regime, DSI is not defined in the BBNJ Agreement.

⁶⁵ Examples of non-monetary benefit-sharing include access to MGR samples and to DSI, transfer of marine technology, capacity building, and technical and scientific cooperation (art. 14(2)).

national jurisdiction will be commercially developed and provide monetary benefits,⁶⁶ so the guaranteed funding will provide an immediate source of finance for developing countries after the Agreement enters into force. Subsequently, the COP may adopt modalities for monetary benefit sharing that replace this guaranteed funding mechanism, for example, involving milestone payments or royalties on the commercialization of products (art. 14(7)). But adoption of these modalities will require a three-quarters majority vote and Parties will have the right to opt out of them for up to four years (art. 14(8)). Importantly, whatever monetary benefits are provided to developing countries will not go into their general treasury; rather, they must be used for the conservation and sustainable use of BBNJ (art. 14(5)).

Finally, like other parts of the BBNJ Agreement, the MGR section has an institutional dimension. It establishes an “access and benefit sharing committee,” which will have fifteen members and may make recommendations to the COP on a variety of topics, including a code of conduct for MGR activities; modalities, rates, and mechanisms for monetary benefit-sharing; and procedures for monitoring and transparency (arts. 15, 16(1)).

VI. AREA-BASED MANAGEMENT TOOLS

An area-based management tool is a tool, such as an MPA, for “a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives” (art. 1(1)).⁶⁷ The ABMT section of the BBNJ Agreement has as a key objective to “conserve and sustainably use areas requiring protection, including through ... ecologically representative and well-connected networks of marine protected areas” (MPAs) (art. 17(a)). This objective mirrors, *sub silentio*, that of the Kunming-Montreal Global Biodiversity Framework, which calls for the effective conservation and management of thirty percent of the earth’s surface by 2030 “through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures” (the 30x30 goal).⁶⁸ Achieving the 30x30 goal will require giving protected status to large areas of the high seas, which cover roughly half of the earth’s surface.

⁶⁶ Before MGRs or DSI will produce monetary benefits, useful materials and information need to be isolated, screened, and tested; receive regulatory approval; and be manufactured and distributed.

⁶⁷ MPAs are a subset of ABMTs and focus more on long-term conservation objectives, allowing sustainable use only when it is consistent with these objectives. BBNJ Agreement, *supra* note 4, at art. 1(9) (defining MPAs).

⁶⁸ Kunming-Montreal Global Biodiversity Framework, Target 3, CBD Decision 15/4, UN Doc. CBD/COP/DEC/15/4, at 9 (Dec. 19, 2022).

A variety of existing international instruments or bodies provide for the establishment of ABMTs. For example,

- The International Maritime Organization can designate particularly sensitive sea areas (PSSAs) in which maritime activities are restricted, including through routing measures and Vessel Traffic Services.⁶⁹
- Several MARPOL annexes allow Parties to designate Special Areas, in which heightened measures to prevent ship-based pollution apply.⁷⁰
- RFMOs limit fishing in designated areas, including areas beyond national jurisdiction.⁷¹
- Several UNEP regional seas programs establish processes to designate marine protected areas (MPAs), and the OSPAR convention parties have established eight MPAs in the North-East Atlantic in areas beyond national jurisdiction.⁷²

Given these existing mechanisms to designate ABMTs, some states argued in the BBNJ negotiations that establishing an additional mechanism was unnecessary.⁷³ None of the existing mechanisms, however, allows for the designation of MPAs that manage activities in a holistic manner and bind states globally. The IMO, MARPOL, and RFMOs can adopt only sectoral measures, and the regional sea programs apply only to states in that regional. As a result, there is no way to protect a high seas area from the full range of human activities that threaten it. Proponents of the BBNJ Agreement's ABMT mechanism hoped to remedy this deficiency.⁷⁴

The ABMT section has several significant elements:

- First it provides for the establishment of ABMTs by the COP by a three-quarter majority vote, if two-thirds of the parties agree that all efforts to reach consensus have been exhausted (arts. 22(1), 23(1)-(2)), thereby ensuring that a

⁶⁹ International Maritime Organization, *Particularly Sensitive Sea Areas*, at <https://www.imo.org/en/OurWork/Environment/Pages/PSSAs.aspx>.

⁷⁰ International Maritime Organization, *Special Areas under MARPOL*, at <https://www.imo.org/en/OurWork/Environment/Pages/Special-Areas-Marpol.aspx>.

⁷¹ Terje Løbach et al., *Regional Fisheries Management Organizations and Advisory Bodies: Activities and Developments, 2000-2017*, FAO Fisheries and Aquaculture Technical Paper 651 (2020).

⁷² OSPAR Commission, *MPAs in Areas Beyond National Jurisdiction*, at <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>

⁷³ Tiller et al, *supra* note 35, at 240.

⁷⁴ Daniel Kachelriess, *The High Seas Biodiversity Treaty: An Introduction to the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, IUCN, at 15-16 (2023), at <https://www.iucn.org/sites/default/files/2024-01/iucn-bbnj-treaty-policy-brief.pdf>. On the limitations of existing mechanisms, see David Freestone, *Governance of Areas Beyond National Jurisdiction: An Unfinished Agenda?* in *LAW OF THE SEA: UNCLOS AS A LIVING TREATY* 231 (Jill Barrett & Richard Barnes eds., 2016).

small group of states is not able to block the establishment of an ABMT or the adoption of management measures.

- Second, it requires “inclusive, transparent and open” consultations with relevant stakeholders, including adjacent states, the scientific community, and Indigenous Peoples (art. 21).
- Third, it gives the Scientific and Technical Body an important advisory role, including to review ABMT proposals (art. 20); provide scientific advice to the COP (art. 22(1)); elaborate further requirements for ABMT proposals and modalities for the consultation process (arts. 19(6), 21(8)); recommend emergency measures (art. 24(3)); and monitor and periodically review the effectiveness of ABMTs (art. 26(3)-(4)).
- Fourth, its list of criteria for identifying potential ABMTs includes two criteria of particular importance to environmental groups: vulnerability to climate impacts and cumulative impacts (Annex I, paras. f and q).

Several compromises necessary to reach agreement, however, make the BBNJ Agreement’s ABMT section fall short of its proponents’ goal of establishing a truly global governance regime to establish MPAs and adopt management measures in a holistic, ecosystem-based, multi-sectoral manner:

First, at the insistence of many countries with large fishing interests, which wanted to preserve the authority of sectoral bodies such as RFMOs, the BBNJ Agreement defers to existing international instruments and frameworks and global, regional, subregional and sectoral bodies (IFBs). In taking decisions to establish ABMTs and adopt management measures, the COP must “respect the competences of, and not undermine,” relevant IFBs (art. 22(2)). It may adopt management measures only if they are compatible with those adopted by IFBs (art. 22(1)(b)). And “where proposed measures are within the competences of other global, regional, subregional or sectoral bodies,” it may only make recommendations to these bodies, not take decisions (art. 22(1)(c)).

Second, as the price of allowing ABMT decisions to be made by a three-quarters vote rather than consensus, the BBNJ Agreement includes a concept originally introduced by Japan to allow Parties to opt-out of decisions for renewable three-year periods, although it bounds the right to object by (1) providing only limited bases for objection (for example, if a Party cannot practicably comply) and (2) requiring an objecting Party to explain the grounds of its objection in writing, adopt equivalent measures or approaches to the extent practicable, not adopt measures that would undermine the effectiveness of the decision, and report on implementation (art. 23(5)-(9)).

The ABMT regime has two additional limitations. Since treaties cannot create obligations for non-parties, the management measures adopted under the BBNJ Agreement will apply only to Parties, not to all countries. Parties to the BBNJ Agreement can only encourage, not require, that non-Parties adopt supportive measure (art. 25(5)).⁷⁵ In addition, although the BBNJ Agreement aims to establish a network of MPAs, it does not establish any explicit process to do so.

Nevertheless, the BBNJ Agreement represents a considerable advance. Under the Agreement, the COP can establish a process to recognize high seas MPAs adopted by regional bodies (such as the high seas MPAs in the North-East Atlantic established under the OSPAR Agreement) (art. 22(4)). It can establish new high seas MPAs and recommend to the relevant IFB the measures it believes necessary to protect these areas from the cumulative impacts of human activities – measures that Parties are generally obligated to promote in the relevant IFB (art. 25(4)).⁷⁶ And it can fill gaps by adopting measures for regions or issues not within the geographic or substantive competence of an existing IFB. Assuming the Agreement comes into force, it will give states a mechanism to coordinate globally, if not regulate, to address the full range of human activities that threaten biodiversity-rich marine areas.

VII. ENVIRONMENTAL IMPACT ASSESSMENT

Part IV of the BBNJ Agreement builds on the environmental assessment provision of the United Nations Convention on the Law of the Sea, which provides:

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....⁷⁷

⁷⁵ As of 2019, nine MPAs had been established in ABNJ, seven under the OSPAR Agreement and two under the Convention on the Conservation of Antarctic Marine Living Resources. Tiller et al., *supra* note 35, at 240 (2019).

⁷⁶ This obligation contains the qualification, “as appropriate,” since Parties can promote measures only in IFBs in which they participate and do not need to promote measures to which they object.

⁷⁷ UNCLOS, *supra* note 6, at art. 206.

Part IV of the BBNJ Agreement elaborates this rather barebones provision “by establishing common processes, thresholds and other requirements for conducting and reporting [EIAs]” (art. 27(a)).⁷⁸

Two issues, in particular, were central to the EIA negotiations: First, what should be the trigger for conducting an environmental assessment? Second, should the assessment process be purely national or involve some degree of international review and/or decisionmaking?

Trigger/threshold. The trigger for EIAs is important because it affects how many activities have the regulatory burden of requiring an assessment: a low trigger results in more activities needing EIAs; a high trigger, fewer. UNCLOS sets a rather high trigger: an EIA is required only when there are “reasonable grounds” for believing that a planned activity “may cause substantial pollution of or significant and harmful changes to the marine environment.”⁷⁹ Some States (including the United States) argued that, as an implementing agreement of UNCLOS, the BBNJ Agreement should use the same trigger. At the other extreme, PSIDS⁸⁰ and the Caribbean Community (CARICOM)⁸¹ argued for the much lower (and hence more stringent) trigger for environmental assessments used in the Antarctic Environment Protocol, which requires an EIA anytime the potential impacts of an activity are likely to be more than “minor or transitory.”⁸²

Ultimately, the BBNJ Agreement resolved this issue through a compromise that retains the UNCLOS trigger for EIAs, but uses the more stringent, “more-than-minor-or-transitory” standard as the trigger for a screening process to determine whether a full EIA is needed. The result is a three-stage process:

- First, the Party with jurisdiction or control over a planned activity must determine whether the activity may have “more than a minor or transitory impact” or has “unknown or poorly understood” effects (art. 30(1)). If not, then no further action is necessary.

⁷⁸ Although the BBNJ Agreement states that one of its objectives is to “operationalize” the EIA provisions of UNCLOS (art. 27(a)), this is not, strictly speaking, accurate, since (1) the obligation of UNCLOS parties to conduct EIAs was already operational pursuant to UNCLOS Article 206 and is not contingent on the BBNJ Agreement, and (2) the BBNJ Agreement’s EIA provisions contain elements that go beyond the EIA requirement in UNCLOS, rather than simply operationalizing it.

⁷⁹ UNCLOS, *supra* note 6, at art. 206.

⁸⁰ The Pacific Small Island Developing States (PSIDS) are a negotiating group comprised of 14 countries that caucus together in various environmental forums.

⁸¹ The Caribbean Community is an intergovernmental organization established in 1973 with 15 member states.

⁸² Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 2941 UNTS 9, Annex I, art. 3(1).

- If the answer is yes, the Party must then screen the activity to determine whether it meets the UNCLOS trigger for EIAs (art. 30(1)(a)). If the Party determines at the screening stage that an EIA is not required, the off-ramp still requires Parties to make the screening information public through the Clearing-House Mechanism, so that other states can register their views and the STB can review the determination and make recommendations (art. 31(1)(a)).
- Third, if the activity meets the UNCLOS trigger, then the Party must ensure that a full-blown EIA is conducted (art. 30(1)(b)).

A key feature of this approach is that the screening stage is significantly less demanding than an EIA. In screening a planned activity, a State must consider only the type of technology involved; the duration, location, and potential impacts of the activity; and the extent to which the effects of the activity are unknown or poorly understood (art. 30(2)). In contrast, when conducting an EIA, a State must do a baseline assessment of the marine environment; analyze potential prevention, mitigation, and management measures; consider reasonable alternatives to the planned activity; and describe follow-up actions, including an environmental management plan (art. 33(2)).

International review and decisionmaking. A second key issue in the EIA negotiations was whether to preserve national control over the EIA process, as Russia and other developed countries generally insisted, or provide for some degree of international review and/or decisionmaking, as mostly developing countries preferred.⁸³ At one end of the spectrum, an EIA could be a purely national process, in which the state with jurisdiction or control over an activity determines on its own whether the trigger for conducting an EIA has been satisfied, ensures that an EIA is conducted, and decides whether to authorize the activity. At the other end of the spectrum, EIAs could be internationalized, with an international body responsible for conducting EIAs and deciding whether, based on the EIA, a proposed activity should be allowed to proceed.

The BBNJ Agreement lands somewhere in between. Parties retain control over the conduct of EIAs and over decisions about whether a planned activity under its jurisdiction or control may proceed (art. 34(1)). But the BBNJ Agreement establishes a variety of obligations and processes aimed at promoting transparency, international consultation and review, and environmental integrity:

⁸³ Tiller et al., *supra* note 35, at 241.

- To promote transparency, it requires Parties to make their screening, draft EIA, and final EIA reports public through the Clearing-House Mechanism (arts. 32(1), 33(3), 33(5)).
- To allow international scrutiny, it affords potentially affected states and stakeholders an opportunity to comment and authorizes the Scientific and Technical Body to review and publicly comment on the Party's screening, draft EIA, and monitoring reports.⁸⁴
- Finally, to promote environmental integrity, it requires Parties to “give consideration” to the concerns of other states and to the STB's comments and recommendations (arts. 31(1)(a)(v), 33(4)); to take “full account” of its EIA in deciding whether to authorize an activity (art. 34(2)); to allow an activity to proceed only if the Party “has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with prevention of significant adverse impacts on the marine environment” (art. 34(2)); to keep the environmental, economic, social, cultural and health impacts of the activity under surveillance (art. 35); and to review its authorization decision if it identifies significant adverse impacts not foreseen in its EIA (art. 37).

The EIA section applies not only to activities that occur in ABNJ, but to activities occurring in areas within a Party's national jurisdiction that may negatively impact the environment of ABNJ. But for activities that occur in areas within a Party's national jurisdiction, the Party may use its national EIA process (art. 28). Moreover, even for activities occurring in ABNJ, the BBNJ Agreement's EIA procedure is not exclusive. If an “equivalent” assessment of an activity's impact has been conducted under another IFB, a Party need not screen or conduct an EIA of the activity (art. 29(4)(b)(i)). The BBNJ Agreement does set two minimum requirements for all EIA processes, regardless of whether they are conducted under the BBNJ Agreement, national law, or another IFB: the Party concerned must make EIA reports publicly available through the Clearing-House Mechanism (arts. 28(2)(c), 29(5)) and ensure that the activity in question is monitored (arts. 28(2)(b), 29(6)).⁸⁵

The EIA section contains two other provisions of particular importance to environmental groups. First, it requires Parties to consider potential cumulative impacts when assessing and deciding whether to authorize an activity – including the impacts of climate change (arts. 1(6), 31(1)(c)). Second, although the BBNJ Agreement does not require Parties to undertake strategic environmental assessments (SEAs) (that

⁸⁴ BBNJ Agreement, *supra* note 4, at art. 31(1)(a)(iv) (screening process), 33(4) (draft EIA), 36(2)-(3) (monitoring reports).

⁸⁵ Activities in areas within national jurisdiction need to be monitored only “in a manner consistent with the requirements of [the country's] national process.” *Id.* art. 28(2)(b).

is, broader assessments of policies, plans, and programs),⁸⁶ it makes the preparation of SEAs an objective (art. 27(d)), authorizes the COP to conduct SEAs, and requires Parties to “consider” doing so (art. 39).

Finally, like the ABMT section, the EIA section seeks to address the concerns of “adjacent states” – in particular, small island developing states (SIDS) – about the potential impacts of activities taking place immediately outside their EEZs,⁸⁷ by providing them opportunities to participate in the assessment process (art. 32) and to be kept informed through the Clearing-House Mechanism during the monitoring, reporting and review phases (art. 37(5)).

VIII. CAPACITY BUILDING AND TRANSFER OF MARINE TECHNOLOGY

Capacity building and the transfer of marine technology (CBTMT) are addressed both in a dedicated section of the BBNJ Agreement (Part V) as well as in its separate sections on MGRs, ABMTs, and EIA. CBTMT was the “least controversial” issue in the negotiations and the “earliest to be closed” at the final session of the IGC.⁸⁸ Engaging in marine scientific research and implementing conservation measures in areas beyond national jurisdiction is difficult. Relatively few countries, concentrated in the Global North, have the technological and financial wherewithal to do so. There was widespread agreement that this deficiency needs to be remedied, in order to enable developing countries both to participate in marine scientific research as well as to implement the Agreement’s provisions on ABMTs and EIAs.⁸⁹

The BBNJ Agreement conceptualizes CBTMT broadly⁹⁰ and provides that it be country-driven, transparent, effective, and needs-based (art. 42). Like other sections of the BBNJ agreement, the CBTMT section includes an institutional component, establishing a Capacity-Building and Transfer of Marine Technology Committee to assess and review needs, identify and mobilize funds, measure performance, and make recommendations to the COP (Articles 45-46). The section also emphasizes broad

⁸⁶ See Kulsum Ahmed et al., *Strategic Environmental Assessment – Concept and Practice*, Env’t Strategy Rep. No. 14, World Bank (2005), at <https://documents1.worldbank.org/curated/en/922351468139198880/pdf/379530ESN140SEA.pdf>.

⁸⁷ See Mendenhall, *supra* note 36, at 5.

⁸⁸ Kachelriess et al., *supra* note 74, at 27.

⁸⁹ Harriet Harden-Davies et al., *How Can a New UN Ocean Treaty Change the Course of Capacity Building?* 32 AQUATIC CONSERVATION: MARINE AND FRESHWATER ECOSYSTEMS 907, 910 (2022); Alf Håkon Hoel, *Capacity Building in Marine Science – Added Value of the BBNJ?* in MARINE BIODIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION 213-14 (Myron H. Nordquist and Ronán Long eds., 2021).

⁹⁰ Annex II sets forth a non-exhaustive list of types of capacity building and technology transfer. , as encompassing private as well as public actors (Article 41(2)), and policy and administrative as well as scientific and technological capacity (art. 44),

participation, requiring Parties to cooperate “at all levels and in all forms,” including through partnerships with the private sector, civil society, and Indigenous Peoples (art. 41(2)).

Despite agreement on the general need for CBTMT, states disagreed on many specific modalities, making progress initially slow. Important issues included:

Should financial contributions and technology transfer be mandatory or voluntary? Developing countries wanted to use the language of obligation in the provisions on finance and technology transfer and preferred the verbs “shall” and “ensure,” while developed countries preferred non-binding verbs such as “promote.”⁹¹ In the end, the Agreement establishes different levels of obligation for capacity building and technology transfer, providing that parties “shall ensure capacity building,” but only need to “cooperate to achieve the transfer of marine technology” (art. 42(1) (emphasis added)). The outcome on monetary benefit-sharing of MGRs, which requires developed countries to pay into a special fund an additional amount equal to 50% of their assessed contributions (art. 14(6)), provides a source of guaranteed funding for developing countries and helped resolve the issue of finance in the CBTMT section of the Agreement. This dedicated, guaranteed source of revenue distinguishes the BBNJ Agreement from most other MEAs.

Who should provide resources for capacity building and technology transfer? The BBNJ Agreement also differs from other MEAs in not imposing the obligation to support capacity building and technology transfer only on developed country Parties. Instead, the obligation applies to Parties generally, although it is qualified by the phrase, “within their capabilities” (art. 42(2)).

Who should be eligible to receive capacity building and technology transfer? States generally agreed that least developed countries (LDCs) and SIDS should be eligible for capacity building and transfer of marine technology. But states disagreed as to which other categories of developing countries should be eligible. Ultimately, they adopted an expansive list, including not only LDCs and SIDS, but also landlocked developing countries, geographically disadvantaged states, coastal African states, archipelagic states, and middle-income developing countries (art. 40(e), 41(3)).

What should be the terms of technology transfer? One of the most significant sticking points in the CBTMT section was how to define the terms of technology transfer. This has been a recurring issue in international environmental regimes. On the one hand, developing countries argue that developed countries should transfer technology to them on “fair and most favored terms,” including through concessional financing.

⁹¹ Mendenhall et al., *supra* note 42, at 7.

On the other hand, the United States and other developed countries argue that technology transfer should take place between countries on whatever terms the two countries agree. The BBNJ Agreement is nominally neutral as between these two approaches. It provides that “the transfer of marine technology ... shall take place on *fair and most favorable terms*, including on *concessional and preferential terms*,” but then adds the qualification, “in accordance with *mutually agreed terms and conditions*” (Article 43(2) (emphasis added)). Similarly, the Agreement provides that technology transfer shall give “particular consideration” to “the interests and needs of developing countries,” but also requires, in the same sentence, that technology transfer “take into account all rights over such technologies and be carried out with due regard for all legitimate interests, including ... the rights and duties of holders, suppliers, and recipients of marine technology” (Article 43(4)) – a formulation that implicitly encompasses intellectual property rights.

IX. CROSS-CUTTING THEMES AND ISSUE

Although the BBNJ Agreement comprises four largely independent sections, a number of themes and issues cross-cut the different sections, some familiar from other multilateral environmental regimes and others more specific to ocean governance.

A. Relationship to existing agreements, frameworks, and bodies

As noted at the outset, many existing international agreements, frameworks, and global, regional, subregional, and sectoral bodies (IFBs) relate to the conservation and sustainable use of marine biodiversity, with different memberships, geographic scopes, and subject matters.⁹² Some address a particular activity such as fishing, maritime transport, or ocean dumping, or a specific species such as whales or tuna, or a specific pollutant such as mercury, while others are more general but operate only on a regional basis. As a result, ocean governance is highly fragmented.

How the BBNJ Agreement would relate to these existing IFBs was one of the main points of contention in the negotiations. Some wanted the ABMT provisions of the BBNJ Agreement to provide an overarching framework that would allow the COP to address the interrelationships between different activities, impacts, and regions and to regulate activities in ABNJ in a comprehensive, multi-sectoral, holistic manner. Others wanted to preserve the authority of existing IFBs, such as RFMOs and the IMO, and instead coordinate their efforts in order to establish effective ABMTs. They argued initially that a BBNJ Agreement was unnecessary and then insisted on language, in the

⁹² See *supra* note 16-25 and accompanying text.

negotiating mandate, that the IGC and its results “should not undermine existing relevant” IFBs.⁹³

The BBNJ Agreement attempts to square these contrasting views by providing in Article 5 that it be interpreted and applied in a manner that “promotes coherence and coordination” with existing IFBs but does not “undermine” them. Exactly what would “undermine” existing IFBs is unclear and will likely be a continuing source of debate. The IGC did not adopt proposals that would have clarified what should not be “undermined”: the effectiveness of existing IFBs or their competences?⁹⁴ The former proposal would have allowed the BBNJ Agreement to exercise concurrent authority with IFBs, so long as it did not undermine their effectiveness. In contrast, the latter proposal would have excluded the BBNJ Agreement from acting with respect to matters within the competence of an existing IFB.

While the general provision in Article 5 is somewhat ambiguous, the more specific provisions of the BBNJ Agreement suggest that the status quo largely prevailed. With respect to ABMTs, for example, the BBNJ Agreement generally defers to existing IFBs. Article 22(2) provides that the COP, in making decisions on ABMTs, shall “respect the competences of, and not undermine” relevant IFBs. If a proposed measure is within the competence of an existing IFB, the COP is authorized only to make “recommendations” to the relevant IFB, not to take decisions (art. 22(1)(c)). As a result, states may not use the BBNJ Agreement to forum shop. If a state wants to propose a shipping rule, it must ultimately go to the IMO for a decision; for a fishing rule, to the relevant RFMO; and for a rule to cordon off part of the seabed, to the International Seabed Authority. It may not use the BBNJ Agreement to circumvent these existing IFBs. Similarly, the provision on dispute settlement includes a savings clause, providing that it shall be “without prejudice” to the dispute settlement procedures to which Parties have agreed as participants or members of a relevant IFB “concerning the interpretation or application” of the IFB (art. 60(8)).

Rather than promoting coherence in ocean governance by overriding or going around existing IFBs, the BBNJ Agreement seeks to promote coherence by working through them. For example:

- Article 8(1) requires Parties to “cooperate ... for the conservation and sustainable use of [BBNJ], including through strengthening and enhancing cooperation with and promoting cooperation among relevant [IFBs]” – a sentiment echoed in Article 47(6)(c).

⁹³ G.A. Res. 72/249, *supra* note 33, at para. 7.

⁹⁴ Kachelriess, *supra* note 74 at 8.

- Article 29(3) directs the Scientific and Technical Body to collaborate with IFBs in developing and updating standards and guidelines for EIAs, and Article 29(1) requires that Parties promote the adoption and implementation of these standards and guidelines in relevant IFBs.
- Although Article 29(4) allows a Party not to undertake an EIA pursuant to the BBNJ Agreement if it has undertaken an “equivalent” EIA pursuant to an IFB, Article 29(5) requires it to publish the assessment through the BBNJ’s Clearing-House Mechanism.
- Article 41(2) requires Parties to strengthen cooperation and coordination between IFBs in providing capacity building and technology transfer.

B. National decision-making versus international prescription

Like many multilateral environmental agreements, the BBNJ Agreement tries to find a middle ground between national and international decision-making. For example:

- It allows Parties to collect MGRs, but requires that they provide international notifications.
- It authorizes the COP to adopt modalities for monetary benefit-sharing of MGRs and to establish ABMTs, but allows Parties to opt out for specified periods of time (though in the latter case, only for certain reasons and subject to various constraints).
- It allows Parties to conduct EIAs and make decisions about whether to authorize activities based on the EIAs, but provides for international input and review.

Broadly speaking, countries that expect to engage in significant activities on the high seas (generally developed countries and some middle income countries such as China and Brazil) preferred to preserve their national authority (for example, their freedom to collect MGRs, conduct EIAs, and decide which activities to approve), while countries with less capacity to utilize BBNJ and greater vulnerability to the impact of high seas activities (generally developing countries) preferred stronger international governance, for example, over the benefit-sharing and EIA processes.

C. Transparency and consultation

Reflecting the fact that states more readily accept procedural obligations relating to transparency than substantive international regulation and decision-making,

transparency plays a major role throughout the BBNJ Agreement, as it does in many MEAs. For example:

- Parties must provide notifications through the Clearing-House Mechanism of their activities in collecting and utilizing MGRs (art. 12).
- The Secretariat must make proposals for ABMTs publicly available (art. 20).
- Parties must provide notifications of planned activities in ABNJ and make their screening information, draft EIAs, EIAs, decision documents, and monitoring reports publicly available through the Clearing-House Mechanism (art. 32).
- The COP is directed to promote transparency in decision-making processes and in the implementation of the Agreement (art. 48).

As a corollary of transparency and a check on national decision-making, the BBNJ Agreement emphasizes inclusive and transparent consultations with all relevant stakeholders – including adjacent states and Indigenous Peoples – when proposing ABMTs (art. 21), throughout the EIA process, and in the implementation of the Agreement (art. 48(3)). In support of these consultation requirements, the Agreement directs its financial mechanism to “support public consultation at the national, subregional, and regional levels” (art. 52(6)(d)).

D. Capacity constraints of developing countries

The Agreement is attentive to the capacity constraints of developing countries not only in its dedicated section on capacity building and technology transfer, but throughout. For example:

- The MGR section has as one of its objectives to build the capacity of developing states to carry out MGR activities (art. 9(b)) and requires Parties to

provide information on opportunities for developing country scientists to be involved (art. 12(2)(h)).

- The ABMT section provides that implementation of ABMTs “should not impose a disproportionate burden on Parties that are SIDS or LDCs, directly or indirectly” (art. 25(3)).
- The EIA section tasks the Scientific and Technical Body with identifying experts to assist Parties with capacity constraints in conducting and evaluating screenings and EIAs (art. 31(3)).
- The CBTMT section includes a provision prohibiting Parties from making capacity building and technology transfer conditional on “onerous reporting requirements” (art. 41(3)).

E. Indigenous Peoples, local communities, and traditional knowledge

Reflecting the increased attention in international law to indigenous rights and traditional knowledge, a coalition of countries that included PSIDS, Canada, Australia, New Zealand, and the United States pushed for a variety of provisions to recognize and protect the rights and interests of Indigenous Peoples and local communities. In addition to general provisions in the Preamble and the “Principles and Approaches” article, the MGR section requires Parties to take measures to ensure that the traditional knowledge of Indigenous Peoples and local communities be accessed only with their free, prior and informed consent (art 13); the ABMT section specifically identifies Indigenous Peoples and local communities as stakeholders with whom Parties are to collaborate and consult in developing ABMT proposals (art. 19(2)); and the EIA section directs the Scientific and Technical Body to consider the relevant traditional knowledge of Indigenous Peoples and local communities when reviewing environmental impact assessments (art. 31(1)(a)(iv)).

F. Disputed territories

One of the last issues to be resolved in the IGC was the concern of some countries that the BBNJ Agreement might be used to prejudice territorial or maritime claims – for example, China’s claims in the South China Sea. The Agreement adopts a “belt-and-suspenders” approach in addressing these concerns. Article 6 provides that the BBNJ Agreement “shall not be relied upon as a basis for asserting or denying any claims to, sovereignty, sovereign rights or jurisdiction, including in respect of any disputes relating thereto.” Article 18 contains identical language with regard to the establishment of ABMTs, and “for the avoidance of doubt,” this same point is echoed in Article 60(10). In addition, to ensure that ITLOS is unable to rule on disputed territories, the Agreement specifically provides that the COP may not request an advisory opinion from ITLOS on “a matter that necessarily involves the concurrent

consideration of any dispute concerning ... the legal status of an area as within national jurisdiction” (art. 47(7)).

G. *Intellectual property rights*

Like the dog that didn’t bark,⁹⁵ the BBNJ Agreement is silent on the issue of intellectual property rights (IPRs). States disagreed about whether to include a provision protecting or overriding existing IPRs, so the solution was to say nothing, at least explicitly.⁹⁶ Nevertheless, three provisions arguably protect existing IPRs implicitly:

- First, Article 5(2) requires the Agreement to be “interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies,” which presumably applies to IPR agreements and bodies (such as the World Intellectual Property Organization), since these are clearly relevant to sharing of MGRs and technology transfer.
- Second, Article 43(4) provides that technology transfer “be carried out with due regard for all legitimate interests, including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology.”
- Third, Article 51(6) allows actors to preserve the confidentiality of information and provides that nothing under the Agreement “shall be interpreted as requiring the sharing of information that is protected from disclosure under the domestic law of a Party or other applicable law.”

IX. CONCLUSION

Almost two decades in the making, the adoption of the BBNJ Agreement has been rightly celebrated. It establishes comprehensive regimes addressing benefit-sharing from MGR and DSI activities, establishment of ABMTs in areas beyond national jurisdiction, environmental impact assessment, and capacity-building and technology transfer, as well as provides a general coordinating framework. To reach an outcome, some issues were resolved by artful compromises: for example, the guaranteed funding provided in the monetary benefit-sharing article and the three-step procedure for EIAs. Other issues were simply skirted: for example, by listing both common heritage of humankind and freedom of the high seas in the “Principles and Approaches” article. Other issues (and many details) were left to the future, such as elaborating additional

⁹⁵ Arthur Conan Doyle, *The Adventure of Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES (1894).

⁹⁶ Mendenhall et al., *supra* note 47, at 5.

modalities for monetary benefit-sharing. Like most MEAs, the BBNJ Agreement is intended to be a dynamic treaty that will evolve over time in response to new information and changing politics. The adoption of the BBNJ Agreement marks the end of one chapter and the beginning of another.

Although the BBNJ Agreement is much more than the “paper tiger” that some environmentalists feared, their hope that the BBNJ Agreement would provide for holistic, integrated governance of BBNJ was not fully realized, frustrated by the decision not to infringe the authority of existing international agreements and institutions. As a result, the BBNJ Agreement will need to rely as much on soft suasion as on regulatory power. One hopeful precedent is the 1995 Fish Stocks Agreement.⁹⁷ It also lacked authority to impose its standards on existing RFMOs, but RFMOs nevertheless largely incorporated those standards over time. The BBNJ Agreement seeks to have a similar influence; to that end, it requires Parties to “endeavour to promote ... the objectives of this Agreement when participating in decision-making under other relevant legal instruments, frameworks, or global, regional, subregional or sectoral bodies” (art. 8(2)). Whether Parties will heed this injunction, and the Agreement will succeed in promoting greater coherence in the fragmented landscape of high seas governance of BBNJ, is a key question for the future.

⁹⁷ Fish Stocks Agreement, *supra* note 6.