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Managers

## **BIODIVERSITY BEYOND NATIONAL JURISDICTIONS (BBNJ)**

High seas: update on the Resumed 5th Session (part 2) of the Intergovernmental Conference (IGC) on Biodiversity Beyond National Jurisdictions (BBNJ)

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Sea and clouds/ ©  
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“ *This breakthrough — which covers nearly two-thirds of the ocean — marks the culmination of nearly two decades of work and builds on the legacy of the United Nations Convention on the Law of the Sea,[...] it is crucial for addressing the triple planetary crisis of climate change, biodiversity loss and pollution [...] and vital for achieving ocean-related goals and targets of the 2030 Agenda for Sustainable Development, and the Kunming-Montreal Global Biodiversity Framework* ”

said the Spokesperson for the Secretary-General in its statement – on the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

This article provides an overview of the content of the [new Agreement](#) focusing on the provisions related to area-based management tools, including protected areas. A more detailed analysis of the final agreement will need to wait for the text’s formal adoption.



# HISTORY

In December 2017, the United Nations General Assembly (UNGA-resolution 72/249) decided to convene an Intergovernmental Conference (IC), under the auspices of the United Nations, to consider an international legally binding instrument under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible.

In total, five sessions were convened from 2018 to 2022. Part 2 the fifth session (IGC 5.2) of the Conference took place at the United Nations Headquarters from 20 February to 3 March 2023. The first part of IGC 5, held in August 2022, was indeed suspended after delegates failed to reach an agreement on several key articles, including benefit-sharing arrangements, decision-making provisions, relationships with other bodies, the role of potential bodies to be established under the agreement, as well as different general overarching provisions.

On the 5th of March 2023, and after what has been described as a real marathon of negotiations “the ship reached the shore” and a final draft 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, has been issued. This text, though final, still needs to be adopted. An open-ended informal working group is established to undertake technical editing of the text. Following technical edits and translation into the six official UN languages, the IGC will reconvene to formally adopt the new Ocean Treaty (date to be determined). 60 ratifications will be needed before this new agreement can enter into force.



School of pelagic fishes swimming in corals/ © Aron Bull



# A LONG-AWAITED AGREEMENT FOR BIODIVERSITY BEYOND NATIONAL JURISDICTIONS

The UN Convention on the Law of the Sea (UNCLOS), adopted in 1982, constitute the overarching framework for the Seas. The UNCLOS provides a legal framework for activities at sea and includes the obligations for States to protect and preserve the marine environment (including rare or fragile ecosystems), with requirements on cooperation between States on a global and regional basis for formulating and elaborating the necessary international rules (UNCLOS Articles 192, 194 and 197). However, the law of the sea was not inaugurated in 1982. In 1930, the League of Nations (League), at the Hague Conference, confirmed the desire of States to create and structure a law of the sea. In the 60s, four conventions came into force:

- The Convention on the Territorial Sea and the Contiguous Zone, which came into force in 1964.
- The Convention on the High Seas, which entered into force in 1962.
- The Convention on Fishing and Living Resources in the High Seas (1966).
- The Convention on the Continental Shelf (1964).

These conventions were soon deemed insufficient to meet the maritime challenges and new negotiations were open for a new convention.

The UNCLOS sets up sovereign rights and a framework for the high seas and the Area (the seabed and ocean floor and the subsoil thereof). Under UNCLOS, the regime for the 'high seas' (Part VII) and for the Area (Part XI), marine ABNJ are considered to be the 'global commons' open for legitimate and reasonable use by all States, and may not be appropriated to the exclusive sovereignty of any one State.

However, gaps and shortcomings to fully reflect the evolving understanding of ecosystem-based approaches and embrace the diversity of uses and threats, have been becoming more and more clear regarding measures to conserve marine biological diversity.



Photos from the meeting / © UN



UN Flag / © Joaquín Corbalán

The states have a duty to ensure that their activities on the High Seas do not harm the marine environment or other states' rights to resources in the area. States are also required to cooperate with each other in the conservation and management of living marine resources. This includes the protection of endangered species, the prevention of overfishing, and the reduction of pollution.

To address gaps, specific activities have been regulated by subsequent agreements, including fishing in 1995 with the UNCLOS Implementing Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), and in 1994 with the Agreement Relating to the Implementation of UNCLOS Part XI on deep-sea mining.

Almost 40 years after the adoption of the UNCLOS, the new Agreement addresses important issues related to the exploitation of marine genetic resources (MGRs), including questions on benefit-sharing; establishing area-based management tools (ABMTs), including marine protected areas (MPAs) to ensure effective conservation; conducting environmental impact assessments (EIAs) for planned activities in ABNJ or for activities within national jurisdiction that may have negative impacts in ABNJ; and provide for the necessary capacity building and transfer of marine technology.



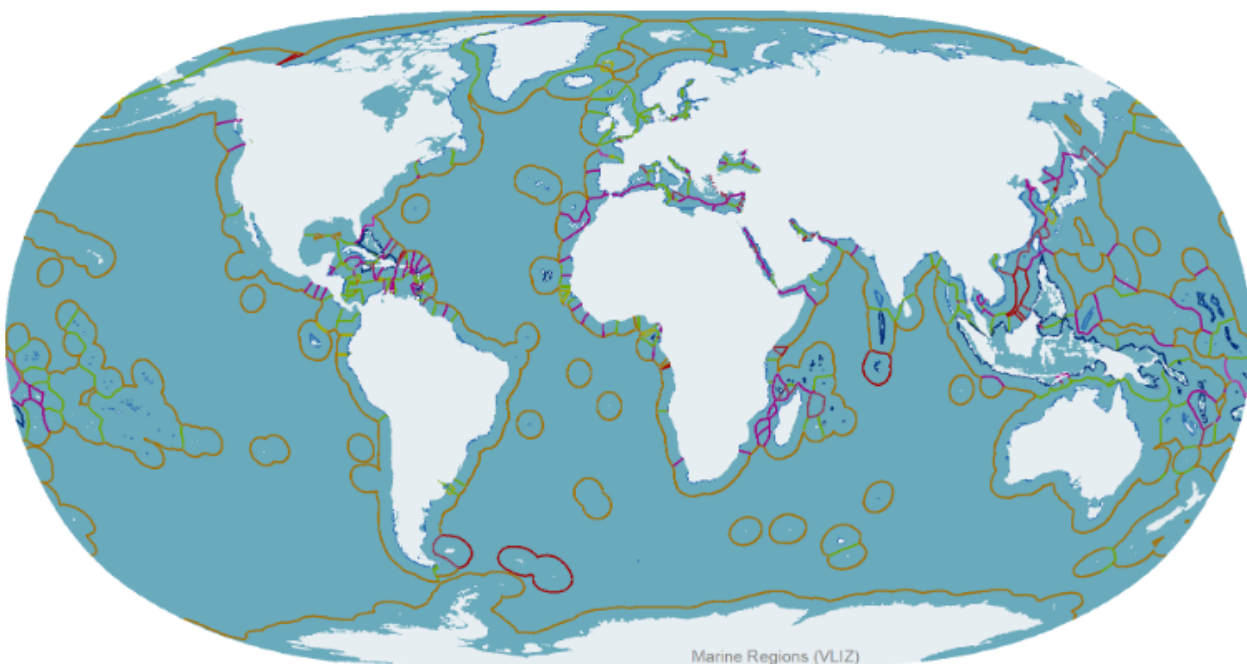
# A FINAL DRAFT IS TO BE STILL ADOPTED TO ADDRESS THE NEED FOR A COMPREHENSION GLOBAL REGIME

As defined by the final text of the agreement “Areas beyond national jurisdiction” means the high seas and the Area (Art 1).

Respect for State sovereignty and national jurisdictions is reiterated in the process of establishing new measures. Article 18.7 indicates that “In cases where an area-based management tool, including a marine protected area, established under this Part subsequently falls, either wholly or in part, within the national jurisdiction of a coastal State, the part within national jurisdiction shall immediately cease to be in force. The part remaining in areas beyond national jurisdiction shall remain in force until the Conference of the Parties, at its following meeting, reviews and decides whether to amend or revoke the area-based management tool, including a marine protected area, as necessary”.

The preamble mentions the “need for the comprehensive global regime under the Convention to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” and that “nothing in this Agreement shall be construed as diminishing or extinguishing the existing rights of Indigenous Peoples, including as set out in the United Nations Declaration on the Rights of Indigenous Peoples, or of, as appropriate, local communities”.

A delegation tabled a new preambular paragraph recalling the quantitative and qualitative protected areas commitment applicable to ABNJ found in the Kunming-Montreal Global Biodiversity Framework, including specific targets for achievement by 2030, as well as subsequent commitments promoting protected areas. Indicating interest, some groups said they needed to consult about inclusion—another group supported by many asked to include a provision on recognising the ecological connectivity of marine ecosystems.



Flanders Marine Institute (2019). Maritime Boundaries Geodatabase, version 11. Available online at <https://www.marineregions.org/>. <https://doi.org/10.14284/382>.

Please note that for the delineation of our EEZ, we include the archipelagic waters and the internal waters of each country. This is a deviation from the UNCLOS EEZ definition.



# AN INTERESTING SET OF GENERAL PRINCIPLES AND APPROACHES OF THE AGREEMENT

Article 6 of the Agreement encompasses an interesting set of principles and approaches that illustrate the difficult exercise to take into account many different interests:

- |   |  |
|---|--|
| a) The polluter-pays principle;   | h) The use of the best available science and scientific information;   |
| b) the principle of the common heritage of humankind which is set out in the Convention;  | i) The use of relevant traditional knowledge of Indigenous Peoples and local communities, where available;   |
| b) bis. the freedom of marine scientific research, together with other freedoms of the high seas;   | j) The respect, promotion and consideration of their respective obligations, as applicable, relating to the rights of Indigenous Peoples or of, as appropriate, local communities when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; |
| c) The principle of equity, and the fair and equitable sharing of benefits;   |  |
| d) Precautionary principle or precautionary approach, as appropriate;   |  |
| e) An ecosystem approach;   |  |
| f) An integrated approach to ocean management;  | k) The non-transfer, directly or indirectly, of damage or hazards from one area to another and the non-transformation of one type of pollution into another, in taking measures to prevent, reduce, and control pollution of the marine environment;   |
| g) An approach that builds ecosystems resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the ocean's role in climate; | l) Full recognition of the special circumstances of small island developing States and of least developed countries;   |
|   | m) Acknowledgement of the special interests and needs of landlocked developing countries.  |

One delegation emphasized that there is no principle comparable to the common heritage of humankind that could “best future-proof” the new agreement, underlining that this principle has the support of 140 states.



# AN AMBITION TO ACT AS STEWARDS OF THE OCEAN

The preamble mentions also the “Desiring to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biodiversity of areas beyond national jurisdiction”. Many delegates stressed the importance of this paragraph for present and future generations.

A group of countries suggested referring to ensuring “sustainable” rather than “responsible” use of the marine environment; and “conserving” rather than “preserving” the inherent value of biodiversity of ABNJ, attracting considerable support. However, the general objective of the Agreement was to streamline efforts towards the conservation and sustainable use of marine biodiversity in ABNJ.

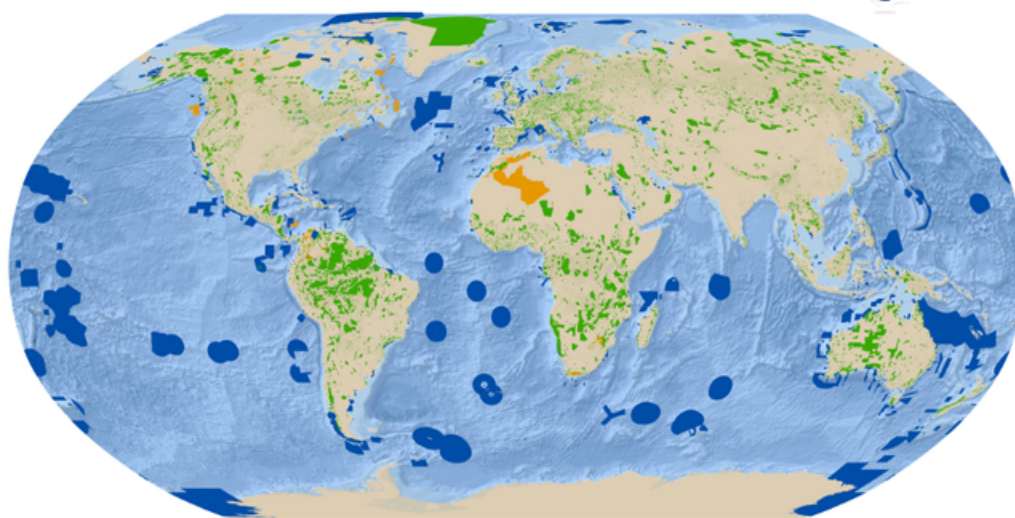
## A COMBINED OBJECTIVE OF THE AGREEMENT: CONSERVATION AND SUSTAINABLE USE

The general objective of the Agreement is two-fold “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” (Art 2).

## A NEW DEFINITION OF MARINE PROTECTED AREAS

The text of the draft Agreement that deals with Area-based management tool (ABMT) is defined as a “tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives in accordance with this Agreement” (Art 1).

### Protected areas and OECMs of the world



Source: UNEP-WCMC and IUCN (2023). Protected Planet: The World Database on Protected Areas (WDPA) and World Database on Other Effective Area-Based Conservation Measures (WD-OECM) [On-line]. March 2023. Cambridge, UK: UNEP-WCMC. Available at [www.protectedplanet.net](http://www.protectedplanet.net)



■ Terrestrial protected areas ■ Marine and coastal protected areas ■ OECMs





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

This definition differs from the one of Protected Areas agreed upon in the frame of the Convention on Biological Diversity (CDB). The term “protected area” is indeed defined in Article 2 of the Convention as “a geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives”.

It differs also from the definition of IUCN: “as “a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”.

This difference and the explicit reference to sustainable use are in line with the dual objective of the Agreement (see above).

A full dedicated part of the Agreement displays the process to submit and establish new measures, including marines protected areas (Part III).

## **AN ENTIRE PART DEDICATED TO AREA- BASED MANAGEMENT TOOLS**

Highlighting the importance to provide a more explicit regime to area-based management tools, including marine protected areas in areas beyond national jurisdictions, the new Agreement includes a Part III dedicated to these measures with 10 articles. This point of the negotiation was actually one of the most discussed.



Blue marlin/ © Kelly Dalling



The objectives of this Part III are (Art. 14):

- a) Conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas;
- b) Strengthen cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies;
- c) Protect, preserve, restore and maintain biodiversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution;
- d) Support food security and other socioeconomic objectives, including the protection of cultural values;
- e) Support developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, taking into account the special circumstances of small island developing States, through capacity-building and the development and transfer of marine technology in developing, implementing, monitoring, managing and enforcing area-based management tools, including marine protected areas.

The new Agreement clearly specifies that “The establishment of area-based management tools shall not include any areas within national jurisdiction and 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” (Art.15).

Another important point of the discussion was the need to respect the mandates of relevant international frameworks and bodies (IFBs). This issue was a cross-cutting across several parts of the Agreement and had to be discussed in different negotiating settings.



Dolphin Underwater / © Kammeran Gonzalez-Keola



## SUBMISSION OF NEW MEASURES

Regarding the process to submit new measures Articles 17, 17 bis and 18 of the Agreement indicate that:

“Proposals regarding the establishment of area-based management tools, including marine protected areas, under this Part shall be submitted by Parties, individually or collectively, to the secretariat”

“Parties shall collaborate and consult, as appropriate, with relevant stakeholders, including States and global, regional, subregional and sectoral bodies, as well as civil society, the scientific community, the private sector, Indigenous Peoples and local communities, for the development of proposals”.

“Upon receipt of a proposal in writing, the secretariat shall make the proposal publicly available and transmit it to the Scientific and Technical Body for a preliminary review”.

“Consultations on proposals submitted under article 17 shall be inclusive, transparent and open to all relevant stakeholders, including States and global, regional, subregional and sectoral bodies, as well as civil society, the scientific community, Indigenous Peoples and local communities”.

## ESTABLISHMENT OF NEW MEASURES:

Article 19 of the Agreement displays the different modalities for the Conference of the Parties of the Agreement to establish new measures:

The Conference of the Parties, on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific inputs received during the consultation process established under this Part, and the scientific advice and recommendations of the Scientific and Technical Body:

(a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures;

(b) May take decisions on measures compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, in cooperation and coordination with those instruments, frameworks and bodies;

2. In taking decisions under this article, the Conference of the Parties shall respect the competencies of and, not undermine, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

This last point was deeply discussed during the negotiations.

## DECISION-MAKING RULES:

The principle for decision-making is the consensus however the 19. bis indicate:

1. As a general rule, the decisions and recommendations under this Part shall be taken by consensus.
2. If no consensus is reached, decisions and recommendations under this Part shall be taken by a three-quarter majority of the representatives present and voting, before which the Conference of the Parties shall decide, by a two-thirds majority of the representatives present and voting that every effort to reach agreement by consensus has been exhausted.
3. Decisions taken under this Part shall enter into force 120 days after the meeting of the Conference of the Parties at which they were taken and shall be binding on all Parties.

A Party can make an objection in writing during a period of 120 days.



School of pelagic silver fish/ © Aron Bull

## POSSIBILITY TO ESTABLISH EMERGENCY MEASURES:

**A clear call for strengthening and enhancing cooperation among parties, legal instruments and frameworks.**

The text of the Agreement clearly states that countries should cooperate for the objectives of the Agreement both in the frame of this agreement but also of other legal instruments and frameworks as well as in marine research and technology (Art.6):

1. Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and promoting cooperation among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies in the achievement of the objective of this Agreement.

2. Parties shall endeavour to promote, as appropriate, the objectives of this Agreement when participating in decision-making under other relevant legal instruments, frameworks, or global, regional, subregional or sectoral bodies.

3. Parties shall promote international cooperation in marine scientific research and in the development and transfer of marine technology consistent with the Convention in support of the objective of this Agreement.”



**To be continued.**



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