

Oceans Biodiversity Collective

A POLICY RESEARCH GROUP ON THE BIODIVERSITY BEYOND NATIONAL JURISDICTION (BBNJ) TREATY

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On March 5th 2023 State Parties agreed the text of a new treaty governing biodiversity beyond national jurisdiction (BBNJ) concluding 15 years of preparatory and intergovernmental negotiations. The Treaty will enable equitable governance of Ocean biodiversity in this, the UN designated Ocean Decade.

Ratification of the BBNJ Treaty can be hastened by actionable policy research bringing certainty to scope of Treaty text, some elements of which are unprecedented in the governance of biodiversity. Gains arising from the Treaty such as enhanced transparency on the aggregate use of genetic resources from ABNJ, the designation of marine protected areas, sharing monetary and other benefits for conservation and sustainable use of biodiversity and better access to digital sequence information and related technologies represent a phase shift in biodiversity governance.

The project lead and co-leads acted as advisors to the G77 Chair in the run-up to the final negotiations of the Treaty. They produced key briefing documents on Part II on Marine Genetic Resources (MGR). Building on existing progress made by cross regional Groups, their expertise contributed to developing state consensus positions¹ on what up until then was widely regarded as the most contentious part of the negotiated draft Treaty text. As a result of a great deal of hard work and compromises by different State Party groups, critical provisions framed by both the common heritage of mankind and the freedom of marine scientific research were achieved.

What next?

Each State Party will likely undertake analysis of the impact of Treaty provisions on domestic law and existing international obligations with a view to achieving legal certainty and assessing technical feasibility. Implementation will require multilateral cooperation around the institutional structures explicitly and implicitly embedded in the Treaty; as well as engagement with stakeholder groups.

¹ S Thambisetty, P Oldham, C Chiarolla 'Developing State Positions in the Making of the BBNJ Treaty: A Expert Briefing Document on Marine Genetic Resources forthcoming LSE Law WPS Dec 2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4580046>

Policy frameworks must prevent a race to the bottom in terms of regulatory burdens; maintain the perceived legitimacy of agreed measures and ultimately enable all countries to equitably benefit from accelerating scope and extent of activities on the high seas. The scale of the challenge is complicated by the wide disparities in technological proficiency and ability to engage with international policy frameworks.

Equitable implementation of elements such as the BBNJ standardised identifier (Art 12(3)), the recording of material outcomes like patents, publications and products (Art 12(8)), 'tiered fees' (Art 14(7)) and the diversified aggregate criteria that can be used to set those fees will be critical to the coherence of any governance and implementation framework that results. These elements were brought to the negotiating table by G77/China Group, yet frequently in international technical negotiations developing countries are perceived as lacking epistemic authority on issues involving emerging science and technology issues.

The period before ratification by 60 countries (expected to take at least 2025) is likely to see many entities trying to imprint their interpretations of Treaty language where there is ambiguity or unprecedented language in an attempt to influence global policy frameworks. Over time as the policy space constricts, there will be at least two core challenges – first, that there is no erosion of the good faith intent behind Treaty provisions and that developing country interests continue to be represented in dialogues on the scope and implementation of provisions. Secondly, that legal obligations of stakeholders including marine scientists and private entities who have to be brought under domestic measures straddling multiple frameworks including data governance and intellectual property rights, be clearly mapped.

Many of the documents and briefings that fed into the final negotiations were confidential or took place behind closed doors. Inevitably, there are parts in the Treaty where words were dropped or changed in the final hours and minutes that will require interpretation. Actors with the most information (negotiators, diplomats and their experts) comprise critical institutional memory that can help steer policy and legislative frameworks. Bringing certainty to stakeholder obligations and clarifying the meaning and scope of the provisions will contribute to the work of State Parties gathering resources prior to ratification.

Objectives

The project establishes an Ocean Biodiversity Collective to convene dialogues with the following objectives:

1. Support the ratification and entry into force of the Treaty and facilitate future work of Treaty bodies such as the Access and Benefit Sharing Committee and the Conference of the Parties (COP)
2. Consolidate a developing state perspective that is mindful of different stakeholders on emerging issues including intersection with other Treaties such as the Convention on Biological Diversity (CBD) and
3. Adopt a pragmatic observer position on good faith implementation and avoiding any erosion of substantive consensus positions.
4. Generate knowledge to contribute to South-South and triangular cooperation on issues such as funding architecture, biotechnology transfer and science and technology cooperation under the BBNJ Treaty and the Kunming-Montreal Global Biodiversity Framework.

New Scholarship and Engagement

In the context of a new international Treaty the line between new scholarship and policy-driven research is not so clear. The Oceans Biodiversity Collective joins the ranks of many working towards normative, doctrinal and policy-based understanding of open-ended Treaty objectives and technical provisions, and is committed to the following

1. A multi-stakeholder conference on new research related to the implementation of the BBNJ Treaty in Summer 2025 to be held at the London School of Economics. The call for papers will go out at least six months prior to the conference.
2. Online dialogues framed by short papers setting out core issues. Potential dialogue topics include, the BBNJ Standardised Batch Identifier, the provenance and meaning of tiered fees in Art 14(7) and the impact of 'no text' on intellectual property.
3. Specific regional and State Parties (small island states with proximity to mega biodiverse areas beyond national jurisdiction, landlocked countries or least developed countries with no biotechnology infrastructure) present evolving normative priorities. We seek to engage with capital-based entities to develop knowledge of and expertise over such priorities.

We welcome collaborators, particularly scholars new to the field who are looking for a forum to present or develop their work. We also welcome invitations to explore pointed policy questions from stakeholders, State Parties, or regional entities in our online dialogues and written papers.

Email law.oceans@lse.ac.uk to receive information on dialogues and discussion papers.