

# **Briefing for INC Delegates on the relevance of the BBNJ agreement for the future international legally binding instrument to end plastic pollution, including in the marine environment (ILBI)**

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## 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 (BBNJ agreement) and its relevance for plastic pollution

- While the BBNJ agreement does not specifically deal with plastic pollution, it contains several provisions which are relevant for the prevention, reduction and control of plastic pollution of the marine environment and the remediation and removal of existing plastics, including abandoned, lost or otherwise discarded fishing gear (ALDFG)
- The environmental impact assessment (EIA) provisions in the BBNJ agreement could have implications for: the production of plastics, in particular since raw materials, such as oil and gas and microorganisms, are also derived from the ocean; the use of plastics in and release into the marine environment; waste management; as well as for the remediation and removal of existing plastics, including clean-up operations and bioremediation.
- The agreement includes among the criteria for the identification of Area-Based Management Tools (ABMTs), including Marine Protected Areas' (MPAs) cumulative and transboundary impacts (e.g., plastic pollution from land- and sea-based sources), in addition to biological, ecological and other criteria.
- The agreement provides a possibility to identify and establish ABMTs, including MPAs, and related measures in areas which are impacted by plastic pollution, among other stressors, thereby also signaling the need to accord them priority attention.
- The agreement also provides for the possibility to adopt emergency measures when a natural phenomenon or human caused disaster, has caused, or is likely to cause serious or irreversible harm to marine biological diversity of ABNJ to ensure that the serious or irreversible harm is not exacerbated.
- Plastic pollution adversely impacts the conservation and sustainable use of ABNJ and the achievement of the objectives of the BBNJ agreement will depend on effective and sustainable action to prevent such impacts, and also best environmental practices that respect biodiversity to avoid exacerbating harm in the remediation and removal of plastics.
- It will be critical in the development of an ILBI to ensure coherence with the provisions of the BBNJ agreement and the mechanisms established therein.

## Background

Negotiations on a new agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the BBNJ agreement) concluded on 4 March 2023.<sup>1</sup> The scrubbed text of the agreement is scheduled for adoption in June this year, when the Intergovernmental Conference resumes its work. It will enter into force 120 days after the deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession.

The agreement sets out obligations to ensure the conservation and sustainable use of marine biological diversity of ABNJ (e.g. in Part I), in particular for, together and as a whole, MGRs, including the fair and equitable sharing of benefits (Part II); ABMTs, including MPAs (Part III and annex I), EIAs (Part IV), and capacity-building and the transfer of marine technology (Part V and annex II). It establishes several institutional arrangements, including a Conference of the Parties (COP) and several subsidiary bodies, including a Scientific and Technical Body (STB) and an Implementation and Compliance Committee, with their composition, among other issues, left to be determined by the COP, a secretariat, a clearing-house mechanism (CHM), as well as a Funding mechanism (Parts VI, VII and VIII). The agreement requires parties to settle their disputes by peaceful means and sets out procedures in that regard (Part IX).

1 The text of the draft BBNJ agreement, dated 4 March 2023, is available at [www.un.org/bbnj](http://www.un.org/bbnj).

The Preamble of the agreement specifically highlights plastic pollution among the causes of biodiversity loss and degradation of ecosystems of the ocean which Parties to the agreement recognize the need to address, in a coherent and cooperative manner. While the agreement does not specifically deal with plastic pollution, it contains several provisions which are relevant for the prevention, reduction and control of plastic pollution of the marine environment and for remediation and removal of existing plastics, including ALDFG. Particularly notable are the provisions of the agreement setting out principles and approaches (e.g. precautionary principle/approach) that Parties should be guided by in achieving the conservation and sustainable use of marine biological diversity of ABNJ (art. 5/7<sup>2</sup>), as well as the provisions presented below

## Environmental impact assessments

The EIA provisions in the BBNJ agreement could have implications for: the production of plastics, in particular since raw materials, such as oil and gas and microorganisms, are also derived from the ocean; the use of plastics in and release into the marine environment; waste management; as well as for the remediation and removal of existing plastics, including clean-up operations and bioremediation, to avoid exacerbating harm.

The BBNJ agreement sets out a tiered assessment process for a planned activity under the jurisdiction or control of a State Party. A Party must conduct an initial screening, which includes an initial analysis of potential impacts, including cumulative impacts,<sup>3</sup> if a project might cause more than a minor or transitory effect on the marine environment or if the effects of the activity are unknown or poorly understood. If the Party determines that the activity will cause 'substantial pollution' and 'harmful changes to the marine environment' a full EIA will need to be conducted (art. 24/30).

The agreement not only addresses the EIA process in ABNJ, but also requires a Party with jurisdiction or control over a planned activity that is to be conducted in marine areas within national jurisdiction, which determines that the activity may cause substantial pollution of or significant and harmful changes to the marine environment in ABNJ, to either conduct an EIA in accordance with the agreement or to make relevant information on the EIA it conducted under its national process available to the CHM. The STB can provide comments to the Party in relation to that information (art. 22/28). Examples of activities to which this EIA requirement might apply include oil and gas exploration and exploitation activities in areas within national jurisdiction in particular those taking place on the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. With respect to oil and gas activities in the Area, it is important to note that all rights in the 'resources' of the Area defined in UNCLOS to mean 'all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules' (art. 133) are vested in humankind as a whole on whose behalf the International Seabed Authority shall act. The resources can only be alienated in accordance with Part XI of UNCLOS and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, as well as the rules, regulations and procedures of the Authority. Such rules, regulations and procedures include the necessary measures with respect to activities in the Area to ensure effective protection for the marine environment, including requirements for EIAs. However, as explained below, there are circumstances when the BBNJ EIA process might apply.

The BBNJ agreement clarifies its relationship with EIA processes under other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies (IFBs) (art. 23/29) and provides that no screening or EIA needs to be conducted under the agreement: (i) if the threshold for EIAs under an IFB is lower than that provided in the agreement, and it has been complied with, or (ii) if the EIA that was undertaken is equivalent to the one required

2 The first article reference reflects the number in the draft BBNJ agreement, dated 4 March 2023, while the second number indicates what is likely to be the number of the article in the final text of the agreement.

3 Such impacts can include those resulting from plastic pollution of the marine environment from sea-based and land-based sources. The agreement defines 'cumulative impacts' to mean the combined and incremental impacts resulting from different activities, including known past and present and reasonably foreseeable activities, or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts.

under the agreement. However, the report of the EIA that was conducted under another IFB is to be published in the CHM. If there is no monitoring and review process under the IFB, then Parties are required to monitor and review the activities and ensure that monitoring and review reports are published through the CHM. It will be important for all relevant IFBs to review their EIA process.

The EIA process is essentially State-led. Therefore, if a private actor (e.g., a non-governmental organization or a company) intends to carry out an activity in ABNJ, such as a clean-up activity, it would be the duty of the State Party under whose jurisdiction or control the activity is to be carried out to ensure that the potential impacts on the marine environment are assessed in accordance with the BBNJ agreement before they are conducted (art. 22/28). It is the State Party which decides whether to proceed with an activity based on the EIA it conducted (art. 38/34). However, the agreement sets out requirements which promote engagement and transparency with a broad range of stakeholders, including through a public notification and consultation process (art. 34/32), the publication of reports, documents and information in the CHM, the possibility for another Party to register its concerns in relation to the results of the screening (art. 30/31) and in relation to authorized activities that may have significant adverse impacts that were either not foreseen in the EIA or that arise from a breach of any conditions of approval of the authorized activity (art. 41/37) and the possibility for the STB to make recommendations (arts. 30/31, 35/33 and 41/37).

The STB is required to develop standards and/or guidelines related to EIAs and strategic environmental assessments (SEAs) for consideration and adoption by the COP (art. 41bis/38) in collaboration with relevant IFBs (art. 23/29). Parties to the agreement must promote the use of EIAs and the adoption and implementation of the standards and/or guidelines in relevant IFBs (art. 23/29). The BBNJ agreement also recognizes the need to build and strengthen the capacity of developing countries to prepare, conduct and evaluate EIAs and SEAs (arts. 21bis/27, 30/31, Part V and Annex II).

## **Area-based management tools, including marine protected areas**

The BBNJ agreement provides for the possibility to prevent, reduce and control the release of plastics in ABNJ through the establishment of ABMTs and MPAs. As noted below, such areas can also be established following the cessation of emergency measures. The agreement includes among the criteria for the identification of ABMTs, including MPAs cumulative and transboundary impacts, in addition to biological, ecological and other criteria (art. 17/19 and annex I). Thus, there appears to be a possibility to identify and establish ABMTs, including MPAs, and related measures in areas which are impacted by plastic pollution, among other stressors, thereby also signaling the need to accord them priority attention, including in remediation and removal activities, subject to the EIA provisions mentioned above. Furthermore, the related measures which the COP could decide on or recommend to Parties when establishing an ABMT, including an MPA, could include measures to address various stressors and sources of cumulative and transboundary impacts in accordance with UNCLOS and the BBNJ agreement. Plastic pollution from land- and sea-based sources is a major source of cumulative and transboundary impacts.

The agreement sets out the content and process for the submission of proposals by States, their review by the STB (arts. 17bis/20 and 18/21), and consultation requirements with a broad range of stakeholders (art. 18/21). On the basis of the final proposal and the draft management plan, the COP: (i) will take decisions on the establishment of ABMTs, including MPAs and related measures; (ii) may take decisions on measures compatible with those adopted by relevant IFBs, in cooperation and coordination with those IFBs; and/or (iii) may, where proposed measures are within the competences of other IFBs make recommendations to Parties to the agreement and to IFBs to promote the adoption of relevant measures through such IFBs in accordance with their respective mandates (art. 19/22). Decisions can be voted on (art. 19bis/23) and the agreement provides for the possibility of a Party to opt-out of a decision to establish an ABMT, including an MPA in certain circumstances (art. 19bis/23). The agreement recognizes the need for support to developing countries through capacity-building and the development and transfer of marine technology in developing, implementing, monitoring, managing and enforcing ABMTs, including MPAs (art. 14/17, Part V and Annex II). Parties must report to the COP on the implementation of ABMTs, including MPAs (art. 21/26) and relevant IFBs are invited to provide information on the measures they have adopted (art. 21/26). The STB is mandated to assess the effectiveness of ABMTs, including MPAs, including related measures and make recommendations to the COP (art. 21/26).

The agreement also provides for the possibility to adopt emergency measures (art. 20ante/24) when a natural phenomenon or human caused disaster, has caused, or is likely to cause serious or irreversible harm to marine biological diversity of ABNJ to ensure that the serious or irreversible harm is not exacerbated. Human caused disasters, such as the recent spills of large amounts of plastic pellets from containers, necessitate prompt response measures. The agreement provides that emergency measures, which may be proposed by Parties or recommended by the STB are temporary and will be replaced by ABMTs, including MPAs, and related measures adopted by the COP or by measures adopted by a relevant IFB, when the circumstances that necessitated the measure cease to exist.

## **Marine genetic resources, including the fair and equitable sharing of benefits**

Various stakeholders that are engaged in either the collection, study and utilization, including commercialization of MGRs and DSI on MGRs of ABNJ in order to: (i) develop, for example, biodegradable products, in particular marine derived bioplastics, and (ii) use them in plastic bioremediation, will need to work with the public sector and the institutions established under the BBNJ agreement to follow the substantive requirements that will become applicable to their activities. The agreement provides that activities with respect to MGRs and DSI on MGRs of ABNJ, are, inter alia, in the interests of all States and for the benefit of humanity and it sets out notification requirements to the CHM and provides for the mandatory fair and equitable sharing of non-monetary and monetary benefits (Part II). The agreement recognizes the need to build the capacity of Parties, particularly of developing States Parties to carry out activities with respect to MGRs and DSI in ABNJ (art. 7/9, Part V and annex II). It is important to note that the agreement will apply to the utilization of MGRs and DSI on MGRs collected or generated before entry into force, unless a Party makes an exception in writing when signing, ratifying, approving, accepting or acceding to the agreement (art. 8/10).

## **Integrated approach to ocean management and cooperation and coordination**

The BBNJ agreement will give the international community a greater say in decisions regarding activities in ABNJ and promote international cooperation, transparency and inclusiveness, including through participation in the BBNJ institutional arrangements; consultations with a broad range of stakeholders, including Indigenous Peoples and local communities, IFBs, the private sector and civil society; publication and access to information in the CHM; reporting requirements; and monitoring and review of activities by the COP and its subsidiary bodies. With respect to the organizations which regulate activities in ABNJ, the agreement provides a vital platform to address the current fragmentation and improve integrated management and support for enhanced cooperation and coordination with and among relevant IFBs.

Plastic pollution adversely impacts the conservation and sustainable use of ABNJ and the achievement of the objectives of the BBNJ agreement will depend on effective and sustainable action to prevent such impacts and best environmental practices with respect to remediation and removal of plastics that respects biodiversity to avoid exacerbating harm. In that regard it will be critical in the development of an international legally binding instrument on plastic pollution, including in the marine environment to ensure coherence with the provisions of the BBNJ agreement and the mechanisms established therein in support of enhanced cooperation and coordination with relevant IFBs.





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