

ACTIO INSIGHT



“THE SHIP HAS REACHED THE SHORE” :
THE NEWLY CONCLUDED INTERNATIONAL TREATY
TO PROTECT MARINE BIODIVERSITY
ON THE HIGH SEAS



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By Setyawati Fitrianggraeni and Fildza Nabila Avianti¹

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A. Executive Summary

After nearly twenty years of negotiations, a new global treaty regulating the sustainable use and conservation of the high seas, areas of the ocean that lie outside of any single nation’s jurisdiction, has just been agreed upon. The Treaty on biodiversity beyond national jurisdiction, better known as the BBNJ Treaty, has been endorsed by nearly 200 countries and is the most significant multilateral environmental convention since the Paris Climate Agreement of 2015.²

The Treaty’s predecessor, the UN Convention on the Law of the Sea or UNCLOS,³ establishes a mechanism for governing marine and maritime activities, including allowing for the freedom of scientific research, the exclusive economic rights of countries, and reducing pollution.⁴ However, areas beyond national jurisdiction, sometimes called the “high seas” or “international waters,” have long been a blind spot with UNCLOS.⁵ Biological diversity is also regulated by the Convention on Biological Diversity (CBD). However, although the CBD used the term “areas beyond the limits of national jurisdiction,”⁶ the CBD did not elaborate further.

The BBNJ Treaty aims to close some of the gaps unregulated by UNCLOS by establishing a new international authority for the high seas with its own secretariat, under the governance of an intergovernmental Conference of The Parties, and with the support of a new scientific and technical committee. The Treaty also reiterates the general principles recognized by the international community, such as the polluter-pays principle, the precautionary approach,⁷ the principle of the common heritage of mankind,⁸ and the obligation to prevent transboundary harm.^{9,10} The Treaty also establishes several new mechanisms, where;

- It establishes a process for designating marine protected areas (MPAs) and other area-based tools to safeguard fragile, biodiverse regions.
- It creates new ground rules for environmental impact assessments of commercial activities on the high seas. States and companies falling under their jurisdiction are obliged to review and report publicly on possible harm that could result to marine ecosystems and organisms.¹³
- It establishes arrangements for the equitable sharing of marine genetic resources (“MGR”). The Treaty has successfully managed to bridge the interests of developed and developing countries by forging an agreement to share the resulting financial benefits. Developed countries, which have more significant financial resources, shall share scientific knowledge and technologies so that developing countries can fulfill their treaty obligations, gain access to marine species and ecosystems that are currently beyond their research, and be full participants in an emerging blue economy. The BBNJ treaty also sets

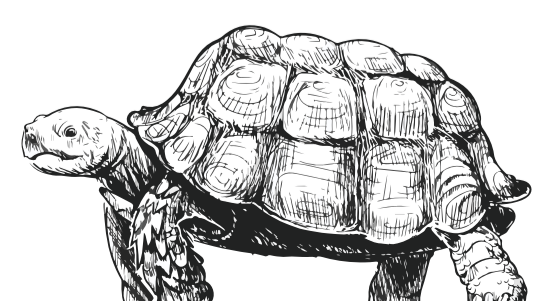
B. Highlights from the BBNJ Treaty

a. Scope of application and exceptions

The objective of the BBNJ Treaty is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Treaty and further international cooperation and coordination.¹²

The BBNJ Treaty applies to all areas beyond national jurisdiction.¹³

The BBNJ Treaty does not apply to any warship, military aircraft, or naval auxiliary. Except for Part II, the Treaty does not apply to other vessels or aircraft owned or operated by a party and used, for the time being, only on non-commercial government service.¹⁴





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b. Parties to the BBNJ Treaty

Parties to the Treaty include States or regional economic integration organizations that have consented to be bound by the Treaty.¹⁵

c. Marine genetic resources (“MGRs”), including the fair and equitable sharing of benefits

MGRs mean any material of marine plant, animal, microbial or other origin containing functional units of actual or potential value heredity.¹⁶

Non-monetary benefits that must be shared following the Treaty are in the form of, among others; access to samples; access to digital sequence information; transfer of marine technology, capacity-building, and others.¹⁷ While the monetary benefits from the utilization of MGRs of areas beyond national jurisdiction, including commercialization, shall be shared fairly and equitably through the financial mechanism set up in the Treaty, such as annual contributions. The BBNJ treaty establishes a voluntary trust fund to facilitate developing states' participation through annual contributions, payments, additional contributions from parties and private entities, and the Global Environment Facility trust fund.¹⁸

Cooperation in capacity-building and transfer of marine technology

States shall cooperate, directly or through relevant legal instruments and frameworks and relevant global, regional, subregional, and sectoral bodies, to assist States, particularly developing States, through capacity-building and the development and transfer of marine science and marine technology.¹⁹ States also shall cooperate with and involve all relevant stakeholders, such as the private sector, civil society, indigenous peoples, and local communities, as holders of traditional knowledge.²⁰

Capacity-building and transfer of marine technology committee

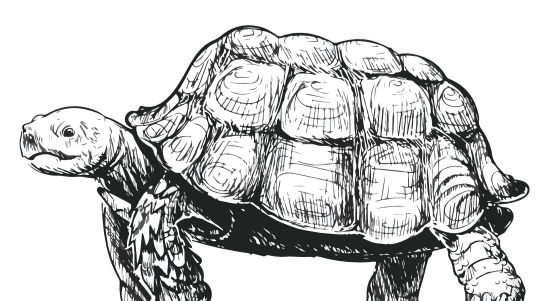
The capacity-building and transfer of the marine technology committee shall consist of members possessing appropriate qualifications and expertise, nominated by States, and elected by the Conference of the Parties, considering gender balance and equitable geographic distribution, and providing for representation on the Committee from the least developed countries, from small island developing states and from the landlocked developing countries.²¹

d. Environmental Impact Assessment

Environmental impact assessment is a process to identify and evaluate the potential impact of an activity to inform decision-making.²² Parties to the Treaty must ensure that the potential impacts of the planned activities under their jurisdiction or control are assessed before they are authorized.²³ However, when a party of the Treaty concludes that the planned activities may cause substantial pollution or harmful changes to the marine environment, that Party shall ensure that an environmental impact assessment of such activity is conducted per the Treaty or the Party's national process. A party conducting such assessment under its national process shall²⁴ :

- Make relevant information available through the clearing-house mechanism in a timely manner during the national process;
- Ensure that the activity is monitored in a manner consistent with the requirements of its national process;
- Ensure that environmental impact assessment reports and any relevant monitoring reports are made available through the clearing-house mechanism as set out in this Treaty

Upon receiving the information above, the Scientific and Technical Body may provide comments to the Party with jurisdiction or control over the planned activity.²⁵





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The process for environmental impact assessments includes:²⁶

- Screening. Parties shall undertake screening in a timely manner to determine whether an environmental impact assessment is required and make its determination publicly available.
- Scoping. Parties shall ensure that key environmental and any associated impacts, such as economic, social, cultural, and human health impacts, including potential cumulative impacts, impacts in areas within national jurisdiction, and others. The scope shall be defined using the best available science, scientific information, and relevant traditional knowledge of Indigenous Peoples and local communities.
- Impact assessment and evaluation. Parties shall ensure that the impacts of planned activities are assessed and evaluated using the best available science and scientific information and relevant traditional knowledge of Indigenous Peoples and local communities.
- Prevention, mitigation, and management of potential adverse effects. Parties shall identify and analyze such measures to avoid significant adverse impacts. Parties shall ensure the preparation and publication of an environmental impact assessment report.

e. Implementation and compliance

States that ratify the BBNJ Treaty shall monitor the implementation of its obligations and report to the Conference on measures it has taken to implement the Treaty.²⁷ The BBNJ Treaty will also establish a committee whose task is to facilitate, consider the implementation of and promote compliance with the provisions of the Treaty.²⁸ The Committee shall consist of members possessing appropriate qualifications and experience, nominated by States and elected by the Conference of the Parties.²⁹ The Committee shall consider implementation and compliance issues at the individual and systemic levels, report periodically, and make recommendations.³⁰ The Committee may draw on appropriate information and relevant legal instruments and frameworks.³¹

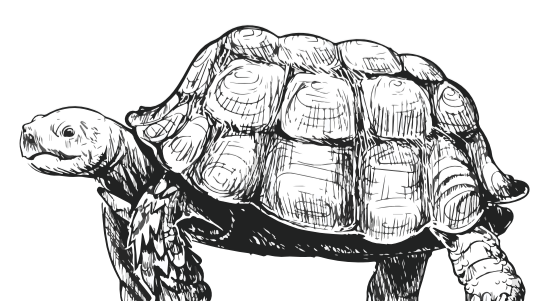
C. Significance of the Draft BBNJ Treaty to Indonesian Context

Indonesian waters are part of the Coral Triangle (CT) region, known as Earth's most prosperous area of marine biodiversity. The CT hosts several corals, crustaceans, mollusks, marine plant species, and thousands of fish species. The CT has the highest coral diversity globally, with 76% or 605 species of the world's reef-building coral species found in this area. The CT has more coral reef fish diversity than anywhere else; more than 2.200 species, or 36% of the world's coral reef fish, are found in this area.³²

The BBNJ treaty will allow Indonesia to obtain monetary and non-monetary benefits from marine resources at the end and beyond Indonesia's jurisdiction.

a. Which Indonesian seas would be regulated under the BBNJ Treaty?

Indonesia has laid claims of a Continental Shelf beyond 200 nautical miles. Under UNCLOS, a country that claims more than 200 nautical miles of the Continental Shelf must submit the claim to the Commission on the Limits of the Continental Shelf.³³ The Commission will then proceed with a recommendation to establish the outer limit of the Shelf. The outer limits delineation based on the recommendation is then regarded as final and binding.³⁴ Indonesia has already received a recommendation from the Commission on the Limits of the Continental Shelf (CLCS) regarding the continental shelf beyond 200 nautical miles northwest of Sumatra Island.³⁵ Meanwhile, Indonesia has also indicated that it will submit its outer limit of the continental shelf beyond 200 nautical miles in Nusa Tenggara and North of Papua.³⁶





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Under this circumstance, there will be an overlap between Indonesia’s designated Continental Shelf beyond 200 nautical miles and the suprajacent waters which fall under the High Seas regime.³⁷ In such a scenario, UNCLOS has determined that the coastal state's rights over the continental shelf do not affect the legal status of the suprajacent waters, which in the case of a continental shelf beyond 200 nautical miles is the high seas.³⁸ Therefore, there will likely be a debate on who has the right to exploit the biodiversity on the high seas but above Indonesia’s continental shelf beyond 200 nautical miles.³⁹

b. What benefits and natural resources would be regulated under the BBNJ Treaty for Indonesia?

i. Benefit from accessing MGRs, including monetary and non-monetary benefit-sharing

MGRs in the deep seabed have shown potential in applying pharmaceuticals, bioremediation, and cosmetics.⁴⁰ The developments and prospects of MGRs in the deep seabed raise questions concerning intellectual property rights. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires patents for inventions to be new, involving an inventive step, and capable of industrial application.⁴¹ Accessing the MGRs in the deep sea also requires intensive capital and advanced technology that Indonesia does not currently have.

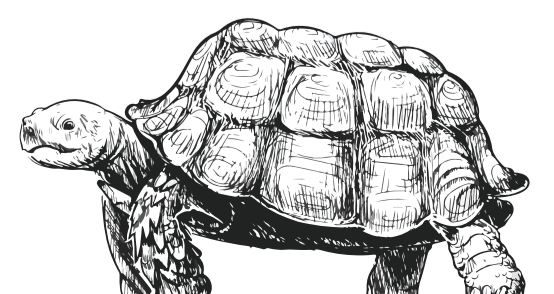
The incoming new agreement of BBNJ will provide Indonesia and developing countries rights to access MGRs that exist in ABNJ. This right will give an advantage to Indonesia to know all MGRs in ABNJ, whether they are potential or not for pharmaceuticals and cosmetics. The knowledge of MGRs potential for medicinal and cosmetic materials will allow Indonesia to develop genetic materials into medicines and cosmetics by themselves because these species may also exist in Indonesian waters.

Other benefits regarding the MGRs are the monetary and non-monetary benefits. However, the mechanism of fair and equitable sharing of benefits is still being debated by States, particularly regarding monetary benefit sharing. The expensive cost of obtaining MGRs in ABNJ and the long route to develop a commercial product cause a lengthy debate on monetary benefits sharing. The blurred distinction between commercial and non-commercial research exacerbates this. In practice, sampling expeditions in ABNJ generally tend to be non-commercial, or at least their objectives

ii. The benefit of obtaining capacity-building and transfer of marine technology

The types of capacity-building and transfer of marine technology may include, and are not limited to, support for the creation or enhancement of the human, financial management, scientific, technological, organizational, institutional, and other resources capabilities of Parties,⁴² such as (non-exhaustive list):

- a. The sharing and use of relevant data, information, knowledge, and research results;
- b. Information dissemination and awareness-raising, including concerning relevant traditional knowledge of indigenous peoples and local communities, in line with the free, prior, and informed consent of these indigenous peoples, and as appropriate, local communities
- c. The development and strengthening of relevant infrastructure, including equipment and capacity of personnel for its use and maintenance;
- d. The development and strengthening of institutional capacity and national regulatory frameworks or mechanisms;
- e. The development and strengthening of human and financial management resource capabilities and technical expertise through exchanges, research collaboration, technical support, education and training, and the transfer of marine technology;
- f. The development and sharing of manuals, guidelines, and standards;
- g. The development of technical, scientific, and research and development programmes;





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Further details concerning the types of capacity-building and transfer of marine technology will be elaborated further in Annex II.

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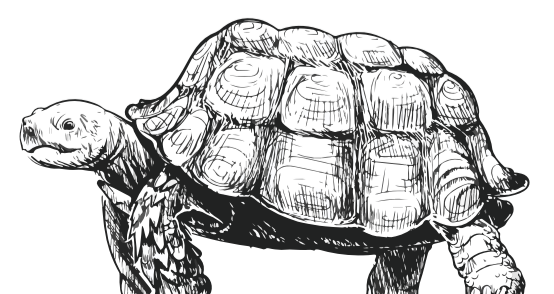
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