



# And so it begins – The adoption of the ‘Biodiversity Beyond National Jurisdiction’ treaty

Rachel Tiller<sup>a,\*</sup>, Elizabeth Mendenhall<sup>b</sup>

<sup>a</sup> SINTEF Ocean, Norway

<sup>b</sup> University of Rhode Island, United States

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## ABSTRACT

After five years of negotiations, the ‘Biodiversity Beyond National Jurisdiction’ (BBNJ) treaty was adopted on June 19th 2023. This adoption meeting was of a celebratory kind and included the final version of the draft treaty in all six languages – ready to be adopted, signed, ratified and enter into force – sooner rather than later. This short communication examines the narratives during this final meeting and assesses the language around the path forward. Key themes brought up in delegations’ final statements were relationships with other instruments, credible paths towards financing the instrument and the role of the Conference of Parties - whose list of tasks for the first meeting is substantial. We also comment on the disassociation of the Russian Federation to the Treaty and its potential effect on its credible successful implementation.

## 1. Introduction

At the Battle of Helm’s Deep in the Lord of the Rings, as the army of Isengard starts charging, King Théoden mutters: “So it begins”, indicating the start of a significant event that will require heroic efforts and boundless energy.<sup>1</sup> For ocean governance, June 19, 2023, was one such event, though less solemn and more celebratory in its nature. It was the day of formal adoption of 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* (“the BBNJ treaty”). The BBNJ treaty is the third implementing agreement to the United Nations Convention on the Law of the Sea (UNCLOS),<sup>2</sup> and opens for signature on September 20, 2023, on the sidelines of the United Nations General Assembly meeting. Signature only represents an intention to ratify, and a commitment to not undermine the objectives of the treaty, though. States must still also go through domestic ratification processes as a formal ‘consent to be bound’ by the treaty. And the BBNJ treaty only enters into force, becoming binding on its members, after 60

ratifications. This process might take a while, though the urgency of its implementation may encourage fast tracking ratification in member states.

Still, in many ways, implementation of the agreement has already begun, as this new phase of interpretation, preparation, and mobilization begins. The agenda for proponents of the BBNJ treaty – both public and private – includes ratification, institutionalization, and capacity building [1]. Decisions must be made about the location of the Secretariat, the modalities of the first Conference of Parties (COP), and how to mobilize financing for the early stages of implementation. Once the COP does meet, it must decide on the rules of procedure and financial rules, in addition to many more specifics for the new institutions established by the treaty.<sup>3</sup> It is those institutions, along with state parties, that will animate and activate the new treaty once it enters into force.

Much will depend on *who* ratifies the BBNJ treaty in time to participate in the first meeting of the COP. Some states, such as China, argued that a higher threshold for entry into force (90 ratifications) was justified by the fact that the treaty deals with global commons areas. But ultimately, the negotiations settled on 60 ratifications, the same

\* Corresponding author.

E-mail address: [rachel.tiller@sintef.no](mailto:rachel.tiller@sintef.no) (R. Tiller).

<sup>1</sup> This sentence refers to fictional events and characters from *The Lord of the Rings* trilogy by J.R.R. Tolkien.

<sup>2</sup> In 1994, an implementing agreement to Part XI of UNCLOS, which considers the management of the deep seabed, was adopted. In 1995, an implementing agreement on managing and conserving fish stocks was adopted, commonly referred to as the UN Fish Stocks Agreement. It entered into force in 2001.

<sup>3</sup> These include the Scientific and Technical Body, the clearinghouse mechanism, the Access and Benefit Sharing committee, the Capacity Building and Transfer of Marine Technology committee, and the Implementation and Compliance committee. The COP is also allowed to create any other subsidiary bodies it deems necessary (Article 47(6)(d)).

threshold used for UNCLOS. In the case of UNCLOS, however, the first 60 states to ratify were all developing countries. If the BBNJ ratification exhibits similar patterns, the nature of implementation could be significantly impacted. Concerns about the cost of ratification for developing states, and stated commitment by several developed states, suggest that the pattern of early ratifications may be more mixed.

This short communication closes the loop of our series of articles on the negotiation of the BBNJ treaty, published in *Marine Policy* [2–7], starting with “The Once and Future Treaty” [3], where we compared the relationship between UNCLOS and the BBNJ negotiations to the events in the classic book *The Once and Future King* [8]. In this book, the protagonist recognizes prior to his death that, although he had not succeeded in creating the kingdom he had hoped for, he will return in a time of future need, try again, and hopefully have better results. Throughout the six articles leading up to this final communication on its adoption, our focus has been related to this analogy, with global leaders returning, almost three decades after UNCLOS entered into force in 1994, to try again and make another implementing agreement that will close the final loopholes of the original treaty.

During this time, our overarching research question in these six articles has always been: “what explains the outcomes of the BBNJ process?” Each previous article focused on a particular two-week session of the intergovernmental negotiating conference. Now, we know what the outcomes of the negotiations are – the text of the agreement, the circumstances of its finalization and adoption, and the declarations made by states explaining their perspective on the treaty. This article, “And so it begins,” responds to the statements and events of the BBNJ adoption conference in June of 2023 only. The article explains where we are now and what we should be paying attention to in the months and years from adoption until the BBNJ treaty enters into force. It therefore serves as an update for those curious about the BBNJ process, a qualifier for optimism about what has been achieved, and an invitation to additional research by social scientists.

## 2. The third and last of the IGC-5’s

The BBNJ adoption conference took place June 19–20th 2023. The inter-governmental conference (IGC) leadership had initially hoped that treaty adoption could take place during the resumed IGC-5 session in February-March 2023, but those negotiations did not conclude in time (and indeed, went a day over schedule), though they did come to consensus at that time. A short adoption session was therefore scheduled after the annual Meeting of States Parties to UNCLOS at the United Nations, to finalize the agreement with its official adoption.

The adoption conference had a substantially different feel compared to previous sessions, in large part because the statements were prepared beforehand, and the speakers were higher level than those who took the lead during the actual negotiations in the previous meetings. Events were also more predictable, as the President’s consultations the week prior had essentially verified that there would not be a vote, because no one would call for one. This would allow for the treaty to be adopted by consensus, which is always the ambition in multilateral negotiations. After a short clarification of the meaning of some treaty terms President Lee asked the member states present: “Shall I take it that the conference agrees to adopt the agreement in all six official U.N. languages?” After a very short pause, she declared “I see no objection, it is so decided, the agreement is adopted.” Applause ensued.

Adoption by consensus was important. Consensus-based decision-making has been a feature of international law of the sea since the UNCLOS III<sup>4</sup> negotiations, and the BBNJ IGCs adopted the same techniques for consensus building during the five years of negotiations.

<sup>4</sup> UNCLOS refers to the United Nations Convention on the Law of the Sea, which is the treaty. UNCLOS III refers to the Third Conference on the Law of the Sea, which are the negotiations that produced the treaty.

These included extensive informal consultations (the ‘informal informals’) and delegation of responsibility for different parts of the text to chairs of the different working groups [9]. Achieving consensus represents ‘buy in’ or endorsement from the larger international community. It also avoids states having to go ‘on the record’ to reject or support the treaty, a choice which could be driven by domestic political considerations rather than a thorough assessment of the treaty’s value. And when voting does happen, as it did at the end of UNCLOS III (called for by the United States), those states that vote “no” generate a kind of political cover for violating treaty provisions in the future.

Although a vote did not occur, and there were no objections to adopting the treaty, after President Lee declared the BBNJ treaty adopted, two states spoke to provide an explanation of their positions. First off, the Russian Federation “dissociated” itself from the consensus of the text of the agreement, stating that “*This instrument is not acceptable. The question of our participation in it is not considered.*” They went on to say that they had chosen not to disrupt the consensus by calling for a vote out of respect for their colleagues from developing states, who, the delegate said, referring to these state representatives, seemed to be convinced the agreement would promote their rights and interests. The second and only other state delegate to take the floor after adoption was Venezuela, which offered general support for the process and outcomes but emphasized that their participation should not be interpreted any provisions of it being binding on them because it is an implementing agreement to UNCLOS, to which they are not a party.

In contrast to the early phases of the adoption conference – efficient, predictable, and fully public – the final hours included deliberations about how Russia’s dissociation should be included in the draft report of this fifth session of the intergovernmental conference, which was the last agenda item. As delegates returned to the conference room after lunch on this second day, it became clear that there was no consensus on the inclusion of the original text from the Russian Federation in this draft report text, and informal discussions took place throughout the conference room for more than two hours while delegates were considering the text. The compromise reached was to reference Russia’s position in a footnote, with the provision that “Without creating a precedent for the future, the conference report reflects the reason for the dissociation provided by the Russia Federation as follows...” In the end, the report was adopted, and this chapter of the BBNJ negotiations could close – opening the door for the next one to be written.

## 3. What’s next?

The bulk of the BBNJ adoption conference time was spent on final speeches by states. Many speakers celebrated the BBNJ treaty as a needed triumph for multilateralism (Mexico and Iceland both began their talks with “We did it!”). Others listed the specific contributions of their states and coalitions or referred to the long hours and nights of the last session. The importance of civil society, especially the High Seas Alliance, was noted repeatedly, and the leadership of President Rena Lee was praised with a variety of specific and favorable descriptors. Several states pledged to be among the first to ratify and urged others to begin to lay the political and legal groundwork domestically for an early ratification. The sense of joy was palpable.

But many speakers emphasized the work to come. As Iceland reminded delegates, “...this is only the beginning. Nothing has been conserved or protected, no benefits have been shared.” Developing states consistently highlighted the need for financing, including to support ratification and entry into force. Many speakers referred to the importance of the BBNJ COP moving quickly to make decisions. Two specific proposals for ‘jump starting’ implementation appeared unevenly throughout the speeches: the need for a Preparatory Commission and a pledging conference. Neither was mentioned in the finalized report to the United Nations General Assembly, and it remains unclear whether either will materialize soon.

Clearly, the BBNJ regime is in the early stages of coming into being.

The question of the secretariat is especially important, because of its impact on the operation and implementation of the BBNJ treaty [10,11]. Secretariats play key roles in enabling information flow, building an institutional memory bank, and representing the collective of member states [10]. The BBNJ treaty establishes an independent secretariat but leaves the decision about its “seat” and “host State” up to the COP (Article 50). DOALOS<sup>5</sup> will handle secretariat functions in the interim. Both Belgium and Chile have offered to host the secretariat, and it is likely that the COP will choose the “best offer acceptable” [12]. The location matters for both symbolic and practical reasons. The choice of Jamaica for the seat of the International Seabed Authority (ISA), established by UNCLOS, for example, reflected the importance of the developing states’ New International Economic Order agenda and the Common Heritage of Mankind principle [13]. Potential host states are often keenly aware of the benefits of hosting, which include international prestige and visibility as well as local jobs and economic activity [14]. However, the decision to locate the ISA in Jamaica – far from other major intergovernmental organizations – also raised travel costs, resulting in lower meeting attendance by member states [9]. The choice between a developing and developed state host for the BBNJ treaty will therefore likely reflect similar considerations.

Consequently, much remains to be decided and much remains to be done, and this situation applies to the literature from the growing community of BBNJ-focused researchers [15–24]. The BBNJ treaty, which through its entry into force and institutionalization will become the BBNJ governance regime, offers significant new mechanisms for achieving the conservation and sustainable use of marine biodiversity. The functions and features of the institutions it creates will be the engines of interpretation and application of treaty provisions. While some states may have to undertake domestic campaigns for ratification, all states who ratify must domesticate BBNJ provisions into their legal and regulatory frameworks. Whether the BBNJ treaty is effective, in terms of its stated goals of conservation and sustainable use, and whether it is equitable, will both depend on the creation and operation of its institutional forms, and the actions of states to animate BBNJ mechanisms and fulfill BBNJ obligations.

The BBNJ therefore remains an extremely fruitful area for social science research, especially related to institutional change. New avenues for research about the negotiations themselves are also opening. Specifically, the embargo placed on identifying information about speakers during the “informal informals” by the President has functionally been lifted. This means that researchers can soon begin to analyze raw data in some cases “who said what” during all years of negotiations. This will allow us to draw connections and produce a deeper understanding of how the complex constellations of interests, ideas, and power shaped the design of the BBNJ treaty.<sup>6</sup> The primary reason for not ‘naming names’ during the negotiations was to enable consensus building. That justification for non-attribution no longer holds, and there are both political and academic reasons for considering “who said what.” At least three databases of relevant information are or will soon be made available to the scholarly community.<sup>7</sup> Understanding the conditions of success for

<sup>5</sup> Division for Ocean Affairs and the Law of the Sea in the Office of Legal Affairs at the United Nations

<sup>6</sup> During the negotiations, President Rena Lee asked observers and participants to follow Chatham House rules when discussing or reporting on negotiations in the informal informals. During the last negotiation session (resumed IGC-5), President Rena Lee held an in-person meeting with NGO delegations on February 20, 2023. In this meeting, one of the authors asked whether this restriction would continue after the negotiations concluded. President Lee said “Once the negotiations are over, I have no say. interpret that how you will” (verbatim quote). She went on to emphasize that the reason behind Chatham House rules was to support consensus building during the negotiations.

<sup>7</sup> We refer here to the High Seas Alliance’s “Treaty Tracker,” the MAR-IPOLDATA literature database, and a database of interventions produced by the authors and their collaborators, which we intend to make available soon.

the BBNJ process, as well as the shapers of the design of the BBNJ treaty, will be critical support for the progressive development of the ocean governance regime as humanity responds to new challenges in the 21st century. So it begins.

### CRedit authorship contribution statement

**Rachel Tiller:** Conceptualization, Methodology, Investigation, Data curation, Writing – original draft, Writing – review & editing. **Elizabeth Mendenhall:** Conceptualization, Methodology, Investigation, Data curation, Writing – original draft, Writing – review & editing.

### Data Availability

No data was used for the research described in the article.

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