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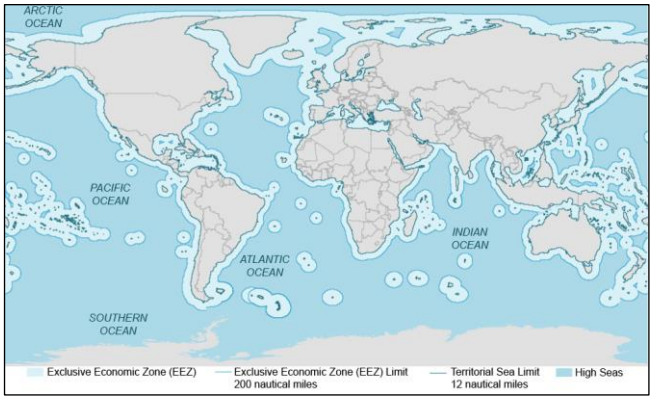
The Biodiversity Beyond National Jurisdiction Agreement (Treaty of the High Seas)

For over a decade, United Nations (U.N.) member countries have discussed creating an international legal framework to address marine biodiversity on the *high seas*. The high seas comprise about 95% of the global ocean by volume (**Figure 1**) and include unique ecosystems rich in biodiversity, such as hydrothermal vents and deep-sea coral gardens. Certain commercial activities on the high seas that may affect the marine environment, such as fishing, shipping, seabed mining, and dumping, are covered by international agreements. The United States is a party to some of these agreements, but no single agreement addresses biodiversity on the high seas as a whole. According to the U.S. Department of State (State), the high seas have only limited governance and are often unmonitored. Congress is interested in various aspects of domestic and international marine biological conservation. One role of Congress is the ratification of international agreements, including those aimed at conservation and sustainable management of the global ocean.

Figure 1. The High Seas



Source: Illustration created by CRS using the Sovereign Limits database (sovereignlimits.com).

Notes: The figure is an illustration only and not for official purposes of identifying the high seas, exclusive economic zones (EEZs), or territorial sea limits. The darker blue areas represent the high seas (i.e., areas beyond national jurisdiction), and the lighter blue areas represent EEZs, within which coastal nations have jurisdiction over both living and nonliving resources.

A new implementing instrument under the 1982 U.N. Convention on the Law of the Sea (UNCLOS), officially proposed by the U.N. General Assembly in June 2015, would address conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction; the instrument is commonly referred to as the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement or the Treaty of the High Seas. Ongoing multilateral negotiations on the agreement focus on opportunities to protect the ocean and its living resources and to address maritime activities that might threaten biodiversity. State's Bureau of Oceans and International Environmental and Scientific Affairs leads the U.S. delegation in these negotiations. The most recent intergovernmental conference took place in August 2022. It was suspended with an anticipated resumption, and possible conclusion, of negotiations in January 2023. Should the BBNJ Agreement be adopted, Congress may consider the advantages and disadvantageous of ratifying it.

Background

UNCLOS establishes a legal regime governing activities on, over, and under the global ocean. Although the U.S. Senate has not ratified UNCLOS, members of the executive branch have stated that some portions of UNCLOS reflect customary international law. The Senate has ratified other agreements developed under the UNCLOS rubric without being a party to UNCLOS. For example, the United States is a party to the 1995 U.N. Fish Stocks Agreement (also known as the Straddling Fish Stocks Agreement), which was adopted after UNCLOS entered into force. Likewise, the United States could become a party to the BBNJ Agreement with Senate ratification.

Four Themes of the BBNJ Agreement

According to draft text referred to during the August 2022 negotiations, the BBNJ Agreement has four themes:

Area-Based Management Tools. Conservation efforts for marine biodiversity on the high seas would focus primarily on establishing new marine protected areas (MPAs). The best available science and traditional knowledge of indigenous peoples, among other criteria, would be required to identify MPAs. An MPA provides protection for all or part of the natural resources within it by prohibiting or limiting certain activities that could harm its biodiversity. To date, the largest international MPA is in Antarctica's Ross Sea. It was established by the Commission for the Conservation of Antarctic Marine Living Resources, of which the United States is a member. There are also MPAs within countries' exclusive economic zones. The National Oceanic and Atmospheric Administration estimates there are nearly 1,000 U.S. MPAs covering 26% of U.S. marine waters (including the Great Lakes).

Environmental Impact Assessment (EIA). The agreement would determine how to implement Article 206 of UNCLOS, which aims to observe, measure, evaluate, and analyze how planned activities may pose a risk to the marine environment—these elements make up the general elements of an EIA. If parties to the agreement believed activities under their control could cause significant harm to

the marine environment, the parties would be required to conduct an EIA. Further, the draft agreement would direct parties to publish and communicate EIA reports to the competent international organization, thereby making the reports available to all countries.

Marine Genetic Resources (MGRs). The agreement would aim to protect accessibility to marine genetic resources (MGRs), which are any genetic materials of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential economic value. For example, MGRs may be of value in the development of pharmaceuticals and cosmetics. The agreement would not allow any nation to claim or exercise sovereignty over MGRs. It also would consider MGRs collected from areas beyond national jurisdiction as common heritage of mankind (CHM), meaning MGRs are available for everyone's use and benefit, including Small Island Developing States, Landlocked Developing Countries, and Least Developed Countries. Benefits could be shared in the form of access to samples, transfer of technology, and data sharing, among others.

Capacity Building and Transfer of Marine Technology. The agreement would require parties to design and implement mechanisms for capacity building, including financing dedicated initiatives, to help developing nations fulfill the obligations of the agreement. The agreement would aim to foster transparency of research activities on MGRs, as well as strengthen marine scientific research capabilities of developing nations, by improving international scientific collaboration and promoting the transfer of marine technologies.

Considerations for Congress

Demand for certain marine resources, such as seafood, seabed minerals, and MGRs, is expected to grow over the next few decades. Current and emerging maritime activities intended to meet these growing demands may contribute to marine biodiversity loss. Although there are international and U.S. federal protections for threatened and endangered marine species, the protections afforded from these agreements, statutes, regulations, and guidelines may be limited in scope or challenging to enforce. The adoption of the BBNJ Agreement may influence the regulation of certain high seas activities, management and use of marine resources, and marine conservation efforts. Congress may consider the advantages and disadvantageous of ratifying the agreement, including the application of the CHM principle, establishment of new international MPAs, overlap with other international agreements, and inclusion of fisheries.

Policymakers report that the most contentious aspect of the BBNJ Agreement negotiations is whether MGRs should be considered CHM. Some stakeholders want the agreement to address existing inequalities in sharing the benefits accrued from areas beyond national jurisdiction. Developing nations (i.e., G77) would like MGRs to be considered CHM. Developed nations argue that under UNCLOS, the CHM principle applies only to seabed minerals. Certain developed nations have reiterated their commitment to capacity development in lieu of application of the CHM principle.

The BBNJ Agreement may further support protections for threatened and endangered marine species by establishing new MPAs on the high seas; approximately less than 1% of the high seas currently are in MPAs. Newly established MPAs would contribute to the global target led by the High Ambition Coalition for Nature and People to protect 30% of the global ocean by 2030, of which over 100 countries, including the United States, have announced their support. In addition, the protection of "blue carbon ecosystems" within MPAs could help regulate the global climate by absorbing atmospheric carbon dioxide. However, some stakeholders and countries have not supported establishing certain international MPAs because some activities (e.g., fishing) may be prohibited or limited within MPA boundaries. In 2022, for example, Russia and China vetoed proposals to establish new MPAs in the Southern Ocean.

One potential goal of the BBNJ Agreement would be to expand the coverage of protections for living resources. Blanket protections for the high seas could help cover geographic areas that lack conservation-focused organizations or agreements. However, some organizations are concerned the BBNJ Agreement might be redundant with other international agreements, including the Straddling Fish Stocks Agreement. Some have further proposed that the BBNJ Agreement should have sector-specific criteria for environmental protection guidelines, such as EIAs specific to fisheries and seabed mining.

The inclusion of fisheries in the BBNJ Agreement also has been debated. Some countries (e.g., Russia, Iceland) appear to favor excluding fisheries. Both Russia and Iceland are Arctic Council members. Although fishing in the Arctic is rare, interest in fishing in Arctic areas beyond national jurisdiction may increase as the extent of summer sea ice declines and global demand for fish grows. Currently, some areas of the high seas are managed by regional fishery management organizations (RFMOs). RFMOs are international bodies made up of countries that operate under international agreements to manage specific areas or certain species or species groups. Parties to RFMOs adhere to fisheries management and conservation measures, such as limiting catch numbers or no-take, within the boundaries of the RFMOs. RFMOs do not cover all of the high seas, though; for example, the South China Sea and the Arctic Ocean have no RFMOs. Some organizations (e.g., the Global Tuna Alliance) recognize the role the BBNJ Agreement may play in sustainably managing high seas biodiversity, emphasizing that the agreement may complement RFMO management measures, especially in areas that have RFMOs.

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