



BBNJ Agreement

HWG

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**LAW OF THE SEA
WORKSHOP**

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BBNJ treaty: what is it?



- Treaty seeks to strengthen environmental protections for biodiversity beyond national jurisdiction (“BBNJ”), given the risks of biodiversity loss, in particular from overfishing, shipping, and proposed deep seabed mining in areas beyond national jurisdiction (“ABNJ”)
- Treaty provides for sharing of the benefits of BBNJ marine genetic resources with developing nations, in part to fund the capacity of developing states to implement the treaty
- Although styled as an implementing agreement of U.N. Convention on the Law of the Sea (“UNCLOS”), the BBNJ treaty alters certain understandings of UNCLOS

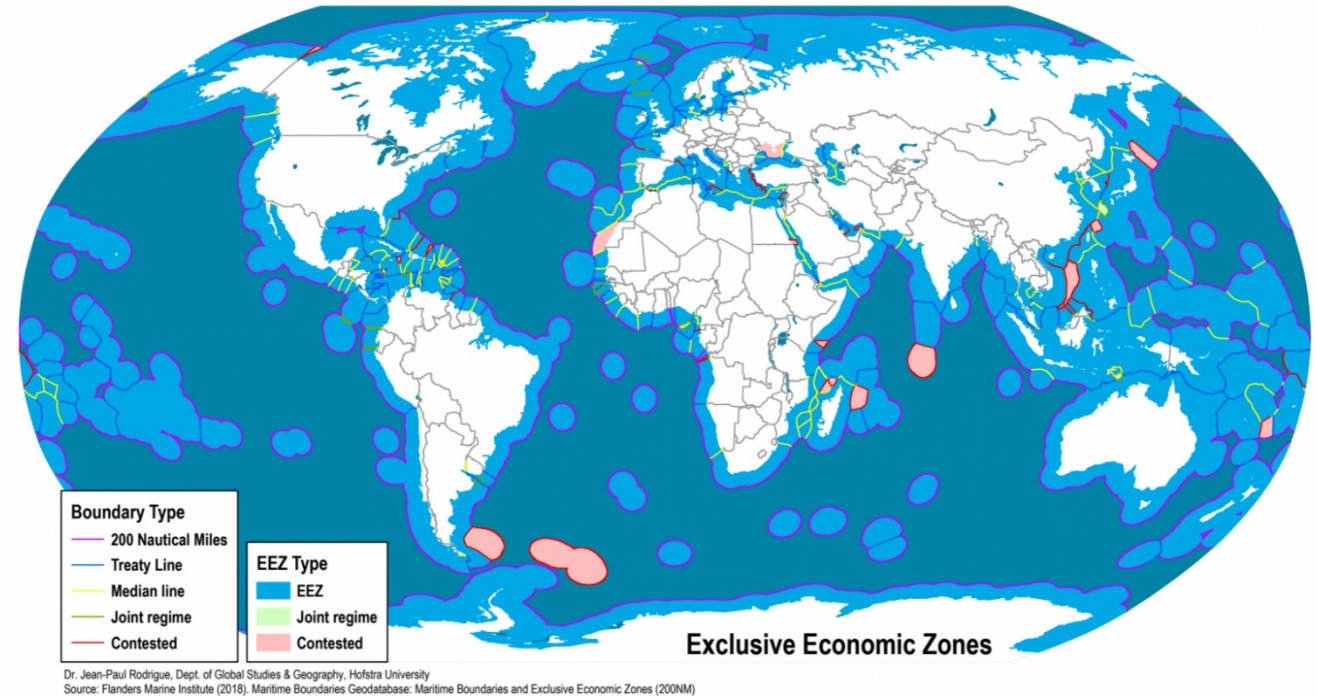


Sources: K. Bressie

ABNJ: geographic scope



- Water column beyond exclusive economic zones of coastal states (the high seas), which extend 200 nautical miles where asserted; and
- Seabed and subsoil thereof beyond continental shelves of coastal states (the “Area”), which can extend beyond 200 nautical miles



Treaty status



- Treaty was adopted by the U.N. General Assembly in April 2023 and opened for signature in September 2023.
- It will enter into force upon the deposit of the 60th instrument of ratification.
- Thus far, 89 parties have signed and 4 have ratified.
- In June 2024, parties will meet to organize a Preparatory Commission to prepare for entry into force.



Source: K. Bressie (with Ambassador Rena Lee)

ICPC general negotiating objectives



- Preserve **UNCLOS freedoms and protections** for submarine cable installation and repair
- Ensure recognition of submarine cables as a **sustainable use** of the oceans and critical infrastructure
- Promote **regulatory certainty** in treaty implementation to ensure timely and predictable permitting for new builds and repairs



Source: K. Bressie

Institutions established under the treaty



- **Conference of Parties (“COP”)**: ultimate decisionmaking body, consisting of all parties that have ratified the treaty (article 47)
- **Secretariat**: to be established by COP, with U.N. Division of Ocean Affairs and the Law of the Sea (and UNCLOS Secretariat) acting as interim Secretariat until that time (article 50)
 - Chile and Belgium are leading candidates for Secretariat host country
- **Scientific and Technical Body (“STB”)**: advisory expert body with key roles advising on ABMTs/MPAs and EIAs and development of standards and guidelines (article 49)
- **Clearing-House Mechanism**: open-access platform through which information about ABMT/MPA proposals and EIA and MGR activity will be disseminated (article 51)
- **Implementation and Compliance Committee**: body to oversee and encourage compliance; not an enforcement entity (article 55)

EIAs generally



- **State-led process:** states having jurisdiction or control over planned activities in ABNJ have responsibility for screening and conducting EIAs and for authorizing activities after EIAs
- **“Jurisdiction or control”** has yet to be defined for submarine cable operators; could mean the cable ship’s flag state, landing state, and/or state in which an owner is organized
- **Activity-based approach:** requirements apply to planned activities in ABNJ; planned activities in areas of national jurisdiction that may have effects in ABNJ can be considered under national processes; could include both a cable installation and a repair

EIAs: thresholds



- **First threshold--EIA screening (article 31(1)):** if planned activity “may have more than a minor or transitory effect on marine environment, or if effects of the activity are unknown or poorly understood,” state must conduct screening
 - Treatment of submarine cable installation and repair remains uncertain; some states agree with view that such activities fall below this screening threshold
- **Second threshold—EIA (article 28(2)):** State must conduct an EIA if the planned activity “may cause substantial pollution of or significant and harmful changes to the marine environment”
 - Submarine cable installation and repair are unlikely to exceed this threshold (which is the UNCLOS article 206 threshold)

EIAs: ICPC objectives and next steps



- Ensure that states treat submarine cable installation and repair as **falling below the screening and environmental impact assessment (“EIA”) thresholds** through application of the best available science and traditional knowledge to reach those conclusion
- Support the development by the Scientific and Technical Body (“STB”) of an **indicative non-exhaustive list of activities** that require or do not require an EIA, and the inclusion of submarine cable installation on such a list
- Consider whether to clarify which state has jurisdiction or control over particular planned submarine cable activities (i.e., flag state, landing state, or owner state), or preserve flexibility to determine on a case-by case basis—and the role of ICPC vs. individual project parties
- Consider **use of strategic environmental assessments (“SEAs”)** under article 39 to cover submarine cable installation and repair more generally, as states may cooperate to conduct SEAs on “plans or programs relating to activities under their jurisdiction or control”

ABMT/MPA proposal, consultation, establishment, and implementation (articles 19, 22, and 25)



- One or more states may propose an area-based management tool (“ABMT,” a tool for managing one or several sectors or activities in a geographic area to achieve one or more conservation and sustainable use objectives), including a marine protected area (“MPA”)
- Proposing states shall collaborate and consult, as appropriate, with relevant stakeholders, including civil society and the private sector
- Proposals must take into account the presence of “human activities in the area”
- ABMTs are established by the COP, generally by consensus or otherwise by vote
- Each state must ensure that activities under its jurisdiction or control are conducted in accordance with the ABMT/MPA decisions

ABMT/MPA opt-out (article 23(4) to (8))



- During the 120-day period between the adoption and entry into force of each ABMT/MPA decision, a state party may choose to “opt out” and not be bound by it, by providing notice to the BBNJ Secretariat
- Opt-out grounds include (i) inconsistency with UNCLOS and/or customary international law, (ii) unjustifiable discrimination, or (iii) inability to comply with the ABMT/MPA
- An opt-out notice expires after 3 years unless the relevant state submits a new opt-out notice to the Secretariat

ABMTs/MPAs: ICPC objectives and next steps



- ◉ **Monitor ABMT/MPA proposals** disclosed through clearing-house mechanism
- ◉ **Participate in stakeholder consultations** on proposed ABMTs/MPAs to influence geographic scope and substantive restrictions—particularly for in-service cables within the scope of proposed ABMTs/MPAs
- ◉ **Engage with governments** in pre-proposal and consultation phases to permit new cables and repair of existing ones
- ◉ Address ABMTs/MPAs in desktop studies, plans of work, and permit matrices
- ◉ Consider approaching appropriate states to **seek an opt-out** if an ABMT/MPA imposes disproportional restrictions that preclude the exercise of the cable high seas freedoms

Institutional issues



- Submarine cable industry is not regulated by a global intergovernmental organization
- Consequently, it cannot rely on any other relevant legal instruments or frameworks or by relevant global, regional, subregional or sectoral bodies as a basis for satisfying the treaty's screening and EIA requirements (unlike the IMO for shipping, RMFOs for fishing, and ISA for deep seabed mining), other than perhaps with ship operations.

Institutional issues: ICPC objectives and next steps



- Ensure that the COP establishes bodies and procedures that allow submarine cable issues to be raised and for ICPC to speak in such processes (consistent with the treaty's transparency clause in article 48)
- Seek inclusion of persons with submarine cable technical expertise on the STB's roster of experts, and ideally on the STB itself
- Monitor the decisions and publications of the COP, the Secretariat, the STB and the clearing-house mechanism