

ESG in 3D - April 2023 (Edition 2)

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Environment

High Seas Treaty:

New historic UN treaty to protect marine biodiversity on the high seas.

Headlines

- On 4th March a new legally binding multilateral agreement on the sustainable use of marine biological diversity in areas beyond national jurisdiction (known as Biodiversity Beyond National Jurisdiction or BBNJ) was agreed following almost two decades of negotiations.
- The BBNJ Treaty addresses, among other things:
 - The conservation and sustainable use of marine BBNJ;
 - Marine genetic resources, including question on benefit-sharing (MGR);
 - Area Based Management Tools (ABMT), including marine protected areas;
 - Environmental impact assessments (EIA); and
 - Capacity building and the transfer of marine technology (CB&TMT).
- The BBNJ Treaty has been adopted under the United Nations Convention on the Law of the Sea (UNCLOS) adopted in 1982. UNCLOS does not refer expressly to marine biodiversity, it is commonly regarded as establishing the legal framework for all activities in the Ocean.

Key background

- The BBNJ Treaty marks a significant step forward in terms of establishing a more complete legal framework to protect biodiversity and tackle climate change and reflects growing global consensus over the need for ambitious targets and obligations, including financial commitments, to achieve environmental policy objectives.
- The new BBNJ Treaty shares a number of concepts and approaches with other multilateral environmental agreements, including the fair and equitable sharing of benefits arising from the use of biodiversity, the establishment of protected areas and the transfer of technology. These have proven controversial and have already been the subject of lengthy and protracted negotiations under other treaties.
- As with all such multilateral environmental agreements mechanisms for compliance and enforcement are weak. The new BBNJ Treaty envisages a role for the International Tribunal for the Law of the Sea, established under UNCLOS, in providing advisory opinions on legal questions.

The direction of travel

In using similar concepts and approaches to other Multilateral Environmental Agreements the BBNJ Treaty is intended to better fit within the existing legal landscape. For example, the BBNJ treaty includes commitments to establish a financial mechanism similar to that introduced under the Convention on Biological Diversity. The mechanism would assist developing States Parties in implementing the BBNJ Treaty, including through support for capacity building and the transfer of marine technology, which will be key for many States.

However, this is likely to mean that the BBNJ Treaty will encounter the same challenges in relation to these approaches that have surfaced under other MEAs. For example, the USA has refused to ratify the Convention on Biological Diversity due to concerns that commitments to transfer technology in the Convention would put commercial interests at risk.

Why is this significant?

Adoption of the test of the BBNJ Treaty effectively puts commercial operators in the high seas on notice that stricter national measures are in the pipeline. The establishment of marine protected areas and obligations to carry out environmental impact assessments set out in the BBNJ Treaty will impact commercial operations such as fishing, offshore wind farms and deep sea mining.

Although there is likely to be a significant time lag between States ratifying the new Treaty and action actually being delivered on the ground, business cannot afford to be complacent.

Policy makers are increasingly looking to business for ideas and input on the design of environmental initiatives. The work of the Task Force on Climate-Related Financial Disclosure is a good example of this.

Waiting until national level responses to the BBNJ Treaty start to crystallise before responding runs the risk of missing the opportunity to influence and shape the detail of national and potentially international implementing measures. Now is the time for businesses to get their sea legs.

Key contact



Alistair Taylor

Associate

Alistair.Taylor@brownejacobson.com

+44 (0)330 045 2970

Related expertise

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