

# The Causes of Legal Conflicts between BBNJ and CBD and Pathways for Resolution

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**Abstract:** *After 20 years of negotiations, the BBNJ agreement, aimed at protecting marine biodiversity beyond areas of national jurisdiction, was finally issued. The BBNJ and CBD Convention, which came into force earlier, have a similar vision for biodiversity conservation and use similar management tools, so CBD has a high reference value for BBNJ. On the other hand, there are some overlaps between BBNJ and CBD in the same jurisdiction, which is the root of their legal conflicts. The analysis of the conflict of laws between BBNJ and CBD is helpful for the international community to choose multiple ways to promote international cooperation, to understand and elaborate the BBNJ Agreement in a fair way, to promote the coordination between BBNJ and CBD framework in the early stage of implementation, and to achieve the goal of comprehensive and coordinated protection of global marine biodiversity.*

**Keywords:** *BBNJ; CBD; Legal Conflicts*

## 1. Introduction

For the past two centuries since the Industrial Revolution, the condition of Earth's natural systems has been drastically impacted, leading to ecosystem degradation and a decline in species abundance and habitats, some of which have become extinct, thereby diminishing their utility to humanity. In response to these challenges, nations have adopted the United Nations Convention on Biological Diversity (hereafter referred to as the CBD); and on December 19, 2022, the fifteenth meeting of the Conference of the Parties to the CBD adopted the Kunming-Montreal Global Biodiversity Framework spearheaded by China, establishing the ambitious "30x30" target to conserve at least 30% of the world's terrestrial, inland water, and marine areas and restore 30% of degraded ecosystems by 2030. However, according to the United Nations Environment Programme's "2020 Protecting the Planet Report," only 16.64% of terrestrial and inland water ecosystems (22.5 million square kilometers), and 7.74% of coastal and marine areas (28.1 million square kilometers) are designated as protected areas and reserves <sup>[1]</sup>.

This highlights the ambitious nature of the target to protect 30% of the oceans by 2030. To enhance the protection of marine biodiversity, after nearly two decades of negotiations, the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction under the United Nations Convention on the Law of the Sea (referred to hereafter as the BBNJ) was passed on June 19, 2023. As the third implementing agreement under the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS), it aims to provide a legal basis for the sustainable use and conservation of marine biodiversity outside national jurisdictions.

Both BBNJ and CBD are international legal frameworks concerning biodiversity, aimed at protecting and restoring threatened biodiversity. The principles of biodiversity conservation, sustainable use, and equitable sharing of benefits, as enshrined in the CBD [4], align with the overarching goals of the BBNJ, creating a synergy that positions the BBNJ as a crucial tool in achieving the "30x30" target. However, this alignment of objectives and visions also introduces conflicts in the application of specific legal rules and management measures.

## 2. The Root of Conflicts: Legal Overlap between BBNJ and CBD

As humanity's understanding of the ecological value and holistic nature of marine ecosystems has deepened, the international community has recognized the urgent need to establish a comprehensive

global framework to act as guardians of the entire ocean for present and future generations. This realization is reflected in the preamble of the BBNJ, a legal instrument created to address the gaps in the protection of biodiversity in areas beyond national jurisdiction (ABNJ). The primary cause of the conflict between BBNJ and CBD regarding marine biodiversity conservation arises from their overlapping responsibilities, jurisdictions, and specific measures.

The most fundamental conflict arises from the partial overlap in their respective jurisdictions. According to Article 4(a) of the CBD, its primary jurisdiction is defined as "within areas of national jurisdiction," while Article 4(b) further stipulates that it applies to processes and activities conducted under the control or jurisdiction of a contracting party, regardless of where their impacts occur. This can include activities both within and beyond national jurisdiction. In contrast, Article 3 of the BBNJ explicitly states, "This Agreement applies to areas beyond national jurisdiction." The BBNJ's clarity in jurisdiction directly contrasts with the CBD's extension beyond national borders, leading to a fundamental overlap between the two frameworks.

Throughout the 30 years of the CBD's existence, successive Conferences of the Parties (COP) have continually emphasized the need to establish marine protected areas (MPAs) to conserve biodiversity beyond national jurisdictions, positioning this responsibility as a central tenet of the CBD. International cooperation has been fostered through various annexes to the CBD, and one of the most significant milestones was reached at the 10th COP in 2010, when parties agreed to promote the description of Ecologically or Biologically Significant Areas (EBSAs) beyond national jurisdiction. To date, over 321 EBSAs have been identified globally, covering regions from coastal areas to deep ocean waters, both within sovereign waters and across territorial boundaries, with some located entirely or partially in areas beyond national jurisdiction <sup>[2]</sup>. These legal arrangements, extending jurisdiction beyond national borders to enhance biodiversity protection, are practical and aligned with the core objectives of the CBD.

Prior to the adoption of the BBNJ, these annexes and legal tools effectively filled the legal gap in the international framework for the protection of marine biodiversity beyond national jurisdiction. However, with the recent adoption of the BBNJ—a specialized international legal framework specifically focused on the protection of marine biodiversity in areas beyond national jurisdiction—there is now an overlap in jurisdiction between the two agreements. This overlap creates conflicts that must be addressed through the clarification of legal mandates, the application of appropriate principles, and the development of hybrid management models. Resolving these conflicts will not only enhance biodiversity protection but also promote international cooperation and the sustainable use of marine resources.

### **3. Specific Manifestations of Legal Conflicts between BBNJ and CBD**

The conflicts between BBNJ and CBD, stemming from their shared vision of protecting marine biodiversity, not only occur in their overlapping jurisdictions but also extend to other areas such as the use of area-based management tools (ABMTs), biodiversity conservation standards, benefit-sharing, and dispute resolution mechanisms. Among these, marine protected areas (MPAs)—a form of ABMT—are viewed by the United Nations as one of the most practical and effective means for countries to collaborate in conserving marine ecosystems and protecting marine biodiversity <sup>[3]</sup>.

#### ***3.1 Conflicting Standards for Area-Based Management Tools, Especially MPAs***

The concept of marine protected areas (MPAs) was first introduced at the 1962 World Congress on National Parks, but it did not receive significant attention until the late 20th century. According to available data, there were only 118 MPAs globally in 1970, but by July 2024, the number of MPAs worldwide had grown to 18,200, covering approximately 29.6 million square kilometers, which accounts for 8.06% of the ocean's surface <sup>[4]</sup>. The rapid development of MPAs has been driven by the international community's growing commitment to advancing marine biodiversity conservation. For example, at the 2010 COP of the CBD, MPAs were introduced as a new tool for protecting marine biodiversity in specific areas. During the same conference, the CBD launched a scientific program to identify and describe Ecologically or Biologically Significant Areas (EBSAs). This program has identified 343 areas meeting EBSA criteria across 15 ocean regions, which cover 84% of the global ocean, with over 60 of these areas located beyond national jurisdiction.

The CBD places its primary conservation focus within the framework of national sovereignty,

relying on governmental authority to implement measures. In jurisdictions with established legal frameworks, the creation of MPAs is generally more feasible. Conversely, the BBNJ, as governed under the framework of UNCLOS, necessitates a greater degree of negotiation and cooperation between sovereign states. This dependence on sovereign collaboration gives rise to potential conflicts between the two conventions, as national standards regarding area-based management tools (ABMTs) often diverge.

Under the CBD, the framework for MPAs has evolved significantly, with successive Conferences of the Parties (COPs) establishing relatively consistent definitions and classifications. However, in contrast, the BBNJ remains in its open-signature phase, with only Annex I providing a set of 22 broad principles—such as uniqueness and rarity—as criteria for ABMTs, without fully developed or detailed standards at this stage.

Given that the BBNJ and CBD share broadly similar objectives, it is likely that the BBNJ will draw upon the well-established and effective ABMTs developed under the CBD framework. Nevertheless, the functional similarities between the tools of these frameworks, coupled with discrepancies in the specific standards governing their implementation, are likely to result in future conflicts. Such divergences in standards may create legal uncertainties, particularly when determining which framework's management tools should take precedence in specific legal or geographical contexts <sup>[5]</sup>.

Under the CBD framework, MPAs that have shown effective biodiversity conservation, such as the Great Barrier Reef, the Ross Sea, and various Mediterranean MPAs, are predominantly located in developed regions like Australia, Europe, and North America. These countries benefit from MPAs with a long history of establishment, clearly defined conservation objectives, advanced research capabilities, strong management infrastructure, and relatively small no-take zones with low enforcement proportions. In contrast, MPAs established in developing regions such as South America, Africa, and Southeast Asia tend to have shorter no-take periods, larger restricted areas, and higher proportions of prohibited commercial activities. These management approaches typically require more financial support than those in developed nations, yet the lower economic capacity and limited management infrastructure of developing countries often fail to provide sufficient backing <sup>[6]</sup>.

Economic, cultural, and developmental differences have led to varying standards for marine biodiversity protection among nations. Lower protection standards in some developing countries often fall short of effectively achieving the intended conservation goals. On the other hand, the higher standards advocated by some developed countries and environmental organizations, while more robust, often conflict with the economic development needs of developing nations. This has led to criticism of these high standards as part of a "marine enclosure movement," whereby developed nations are perceived to be imposing restrictive conservation measures that hinder the economic use of marine resources by developing countries.

Differences in protection standards within the framework of the CBD, when applied to areas under national jurisdiction, do not typically lead to significant conflicts. However, when these differences occur in areas beyond national jurisdiction, such as the high seas, they can result in conflicts. It is anticipated that once the BBNJ officially comes into force, discrepancies may arise between contracting parties in terms of domestic legislation, particularly between contracting and non-contracting parties, concerning the designation of protected areas and the standards applied within those areas. This is especially likely in sectors such as submarine cable laying, fisheries, and shipping, where divergent protection standards could lead to significant disagreements <sup>[7]</sup>.

### ***3.2 Conflicts in Management Authorities and Enforcement Powers for Protected Areas***

The potential conflicts between the BBNJ and CBD are formally rooted in the subtle overlaps between these two legal frameworks, but fundamentally, they stem from conflicts regarding national sovereignty. Countries promote global legislation on ecological protection with the core aim of conserving ecosystems to ensure the sustainable supply of biological resources. However, conflicts arise when excessively stringent protection standards hinder a country's access to biological resources, or when non-contracting states harm biodiversity in areas jointly protected by contracting states under the overlapping jurisdictions of the BBNJ and CBD <sup>[8]</sup>.

In such scenarios, the legal basis supporting a coastal state's enforcement measures comes into question. Should this authority derive from the principle of state sovereignty under the CBD, or from the obligations established by the BBNJ? For instance, if a non-contracting party engages in activities that damage biodiversity in areas protected jointly by contracting parties under both the CBD and

BBNJ, the legal framework under which enforcement actions should be taken becomes ambiguous. This ambiguity raises the question of whether the authority to enforce such actions comes from the CBD's framework of national sovereignty or the obligations laid out by the BBNJ.

The core of the conflict lies in the balancing act between sovereign rights and international obligations. Excessive protection standards may conflict with the resource needs of other nations, especially if those standards are applied in areas beyond national jurisdiction, where the BBNJ operates. The issue becomes particularly acute when non-contracting states act in ways that undermine the efforts of contracting states to protect biodiversity in high seas regions. The legal authority for enforcing conservation measures in such areas remains a gray area, caught between the sovereignty-based enforcement of the CBD and the international cooperative obligations of the BBNJ.

As these frameworks overlap, the tension between protecting biodiversity and ensuring equitable access to resources will require careful legal coordination. If left unresolved, these conflicts may hinder the effectiveness of both the BBNJ and CBD in achieving their shared goals of marine conservation and sustainable use of biological resources.

A real-world example of such a conflict is the Southern Ocean whaling dispute between Japan and Australia. Both countries were parties to the 1946 International Convention for the Regulation of Whaling (ICRW). Since the International Whaling Commission (IWC) enacted a commercial whaling ban in 1986 to protect whale populations, Japan, a traditional whaling nation, expressed dissatisfaction with the ban and continued whaling activities in the Southern Ocean, claiming these activities were for scientific purposes. Japan's actions led to strong opposition from environmental organizations, as well as from countries like Australia and New Zealand. During the peak of this conflict from 2000 to 2015, NGOs like Greenpeace and the Sea Shepherd Conservation Society frequently clashed with Japanese whaling vessels. One notable incident occurred on January 11, 2011, when the anti-whaling vessel *Ady Gil* collided with a Japanese whaling ship, resulting in the former breaking in half. The Japanese Institute of Cetacean Research reported that anti-whaling activists had engaged in illegal activities such as boarding research vessels, destroying ships, launching entanglement devices, and throwing projectiles containing chemicals at Japanese vessels.

On March 31, 2014, the International Court of Justice (ICJ) ruled in the case *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)* that Japan's whaling activities violated Article 8 of the ICRW and ordered Japan to cease its whaling operations under the JARPA II research program. Following this ruling, Japan canceled its 2014–2015 whaling season and submitted a new research proposal to the IWC. Despite this, Japan resumed whaling in 2015 with plans to kill 333 minke whales in the Antarctic. In September 2018, Japan again called for the resumption of commercial whaling, but the IWC rejected the proposal. Subsequently, on December 26, 2018, Japan announced its withdrawal from the ICRW, resuming commercial whaling on July 1, 2019, within its territorial waters and exclusive economic zone (EEZ). This move provoked strong reactions from anti-whaling countries like Australia and New Zealand. Due to international pressure, Japan currently limits its commercial whaling to its EEZ, but it is conceivable that Japan may expand its whaling activities under the guise of freedom of the high seas in the future <sup>[9]</sup>.

If Japan's whaling vessels were to operate in the Southern Ocean in the future, Australia would need to find a new legal basis in international law to respond to Japan's activities, since Japan is no longer a party to the ICRW. If Australia were to rely on the CBD, it could criminalize whale hunting, in line with its domestic legislation under the Environment Protection and Biodiversity Conservation Act, the Australian Marine Parks Act, the Endangered Species Protection Act, and the Fisheries and Aquaculture Act. These laws explicitly define actions leading to the death or injury of whales within protected areas as criminal offenses, providing a domestic legal foundation for biodiversity protection. Australia has effectively incorporated the CBD's protection requirements into its domestic legal system and, through the Crimes at Sea Act 2000 (Cth), has extended its jurisdiction in line with Article 4 of the CBD. Under this act, federal and state criminal laws apply not only within Australia's EEZ but also, under certain conditions, to activities involving Australian vessels or citizens beyond the EEZ.

Using this as an example, it is foreseeable that with the implementation of the BBNJ, similar instances of overlapping jurisdiction will increasingly occur on a global scale. The CBD's management and enforcement mechanisms largely depend on the efficient administrative control of national governments, relying on national sovereignty. Under the CBD framework, the protection of marine biodiversity tends to be more immediate and direct, making it more effective in responding to large-scale pollution incidents or illegal fishing activities. In contrast, the BBNJ, due to its need for the establishment of international decision-making, enforcement, and monitoring mechanisms, may not

respond as swiftly as the CBD. However, this slower response time also makes the BBNJ framework more widely acceptable and less prone to direct conflict among states.

The key challenge in protecting high seas ecosystems lies in reconciling the competing interests of states regarding resource exploitation and the avoidance of responsibility. In simple terms, the greatest difficulty in global ocean governance is preventing the "tragedy of the commons."<sup>[10]</sup> Therefore, for the BBNJ, the priority is not to impose a singular model of ecological protection, but rather to serve as an international legal framework that can be broadly accepted and that strives to reconcile the diverse interests and demands of various stakeholders. This approach will ensure that the BBNJ can effectively contribute to marine conservation and governance without exacerbating conflicts between states.

#### **4. Possible Solutions to the Legal Conflicts between BBNJ and CBD**

Given the physical connectivity and holistic nature of the ocean, marine ecological issues are rarely confined to a single nation or region. This highlights the importance of recognizing the ocean as a shared space and fostering a sense of global responsibility. The interconnectedness of marine ecosystems requires that countries, industries, and stakeholders work together to explore diverse pathways for resolving legal conflicts<sup>[11]</sup>. The overlapping jurisdictions of the BBNJ and CBD can lead to conflicts in management tools, enforcement measures, and biodiversity protection efforts, potentially undermining the overall goal of conserving marine biodiversity. Therefore, finding coordinated solutions to these legal conflicts is essential.

##### ***4.1 Clarifying the Central Legal Role of BBNJ***

To achieve the vision of conserving marine biodiversity and prevent the "tragedy of the commons," the BBNJ must establish itself as the primary legal framework for the protection of biodiversity in areas beyond national jurisdiction. On one hand, this requires international political cooperation to promote the idea of a shared ocean destiny and to shift away from traditional notions of marine resource exploitation. On the other hand, the fragmented nature of global ocean governance calls for stronger coordination among existing international treaties and agreements. As an implementing agreement under the UNCLOS, the BBNJ should hold a leading position in addressing the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. The CBD's role, as acknowledged in Decision VIII/21 of the eighth Conference of the Parties, is to provide scientific and technical support, while recognizing that UNCLOS serves as the overarching legal framework for all maritime activities.

##### ***4.2 Establishing Clear Standards and Rules for ABMTs***

Area-Based Management Tools (ABMTs), a key tool under the BBNJ, must be implemented with well-defined standards and rules. It is essential to develop mechanisms for various stages of ABMT implementation, including proposal submission, consultation, evaluation, decision-making, execution, and monitoring. Special attention should be given to the needs of developing countries, particularly small island developing states and least developed countries, to ensure that they are not overburdened by ABMT requirements. Additionally, the designation of ABMTs should avoid including areas under territorial dispute, as doing so could exacerbate conflicts among concerned parties. While Article 18 of the BBNJ avoids directly addressing the question of establishing ABMTs in disputed areas, practical implementation will still require cooperation among states. Including contested areas in ABMTs without consensus could intensify tensions.

Furthermore, management measures for ABMTs should aim for unanimous agreement among stakeholders to avoid giving any state the opportunity to strengthen its control over disputed waters under the guise of marine management. Lastly, it is critical to provide clear and quantifiable criteria for ABMTs, creating a set of guidelines that can serve as reference points for stakeholders when establishing and managing these areas.

##### ***4.3 Proper Understanding of the Principle of Due Regard and the No-Harm Principle***

When addressing marine disputes, it is important to promote principles of shelving disputes and pursuing joint development, fostering the idea of sharing marine resources<sup>[12]</sup>. Additionally, it is crucial to properly understand the "due regard" and "no-harm" principles as outlined in Article 5 of the BBNJ

[13]. This article requires that the implementation of the BBNJ must not harm other existing international legal frameworks, respecting prior agreements and outcomes. This understanding is essential to ensure that the BBNJ does not undermine the achievements of the CBD and other prior international agreements, while also acknowledging the expertise of sectors such as fisheries and shipping.

COP meetings can be used to explore measures that ensure the BBNJ's compatibility with existing CBD management tools, guaranteeing that the entry into force of the BBNJ does not diminish the CBD's effectiveness in biodiversity protection. As an implementing agreement of UNCLOS, the BBNJ must also adhere to the principle of due regard, which is viewed as a legal obligation to respect the rights of other states. This obligation is operationalized through mechanisms such as prior notification and negotiation, ensuring that states exercise their ocean rights with full respect for the rights of others.

Utilizing existing legal coordination tools is also vital. The United Nations Office of Legal Affairs' Division for Ocean Affairs and the Law of the Sea (DOALOS), due to its broad international participation and strong reputation, provides a fair and credible platform for resolving conflicts [14]. Finally, when employing various conflict resolution pathways, it is important to consider multiple interpretive approaches and to interpret legal provisions in good faith. Since the CBD predates the BBNJ, it is necessary to account for historical limitations during the CBD's adoption, and COP meetings should be convened to amend conflicting provisions when necessary.

In conclusion, resolving the legal conflicts between the BBNJ and CBD will require a combination of clear legal definitions, coordinated management standards, and effective dispute resolution mechanisms. By building a cooperative international framework, the global community can work towards protecting marine biodiversity in a sustainable and equitable manner.

## 5. Conclusion

As environmental awareness increases, the international community has come to recognize the crucial role marine ecosystems play in the Earth's environmental health. Over the past thirty years, ongoing international legislative efforts have aimed to establish a comprehensive and equitable legal framework to protect the world's oceans. The BBNJ, as the third implementing agreement under the United Nations Convention on the UNCLOS, is seen as a key instrument for safeguarding biodiversity in areas beyond national jurisdiction. Its goal is to create an interconnected, ecologically representative system of MPAs and to develop ABMTs based on existing standards and databases.

However, as an emerging piece of international legislation, the BBNJ's jurisdictional scope overlaps with that of the CBD, which also focuses on biodiversity conservation. This overlap can lead to legal conflicts that may exacerbate tensions between sovereign states, potentially undermining the BBNJ's goal of broad, collaborative participation in marine biodiversity protection. Therefore, in the future application of the BBNJ, it is crucial to adopt multiple pathways for resolving conflicts, thereby preventing and mitigating any negative impacts that may arise from these legal overlaps.

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