

Proactive Release

21/09/2022

The following Cabinet papers and related Cabinet minutes have been proactively released by the Minister of Foreign Affairs

| Title | Reference |
|--|------------------|
| <i>Cabinet Minute of Decision – Report of the Cabinet External Relations and Security Committee: Period Ended 5 August 2022</i> | CAB-22-MIN-0301 |
| <i>Cabinet External Relations and Security Committee – Minute of Decision – New United Nations Treaty on Marine Biodiversity of Areas Beyond National Jurisdiction: Updated Negotiating Mandate</i> | ERS-22-MIN-0035 |
| <i>Updated negotiating mandate for new UN treaty on marine biodiversity of areas</i> | |

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the OIA). Where this is the case, the relevant sections of the OIA that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to OIA redaction codes:

- 6(a): to avoid prejudicing the international relations of the New Zealand Government;
- 9(2)(g)(i): to protect the free and frank expression of opinions by departments;
- 9(2)(j): to avoid prejudice to negotiations.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet External Relations and Security Committee: Period Ended 5 August 2022

On 8 August 2022, Cabinet made the following decisions on the work of the Cabinet External Relations and Security Committee for the period ended 5 August 2022:

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by the Minister of Foreign Affairs

ERS-22-MIN-0035 **New United Nations Treaty on Marine
Biodiversity of Areas Beyond National
Jurisdiction: Updated Negotiating Mandate**
Portfolio: Foreign Affairs

CONFIRMED

Rachel Hayward
Acting Secretary of the Cabinet

Proactively Released
by the Minister of Foreign Affairs



Cabinet External Relations and Security Committee

Minute of Decision

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New United Nations Treaty on Marine Biodiversity of Areas Beyond National Jurisdiction: Updated Negotiating Mandate

Portfolio Foreign Affairs

On 3 August 2022, the Cabinet External Relations and Security Committee:

1 **noted** that the fifth, and potentially final, round of negotiations on a legally binding international treaty, under the United Nations Convention on the Law of the Sea, on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction will take place in New York in August 2022;

2 **agreed** that New Zealand support a treaty that:

Overarching goal

2.1 halts the decline and promotes the restoration of marine biodiversity in areas beyond national jurisdiction (ABNJ) through establishing an effective global regime for cooperation and coordination between states and regional and international organisations to improve the conservation and sustainable use of marine biodiversity in ABNJ;

Scope, principles, and relationship to other agreements, frameworks and organisations

2.2 covers all existing and new activities and sectors impacting on marine biodiversity in ABNJ, and sets out clear rules and processes for environmental impact assessments, area based management tools and marine protected areas, and access to marine genetic resources, supported by provisions on capacity building and technology transfer;

2.3 is underpinned by the principles and approaches set out in paragraph 18 of the paper under ERS-22-SUB-0035;

2.4 establishes clear global standards and mechanisms to identify and implement marine conservation objectives, to be delivered by existing organisations to the extent possible, and by the Global Oceans Treaty Conference of Parties (COP) in other cases, thereby promoting coordination between states, the COP and these organisations, and lifting the performance of existing organisations;

Other cross-cutting issues

- 2.5 recognises the interests of coastal states whose maritime zones are adjacent to ABNJ, and enables New Zealand to actively consider Māori interests in ABNJ, including kaitiakitanga and taonga species, and the application of traditional knowledge, and mātauranga Māori;
- 2.6 contains decision-making procedures that empowers the COP to take effective decisions and which strike a balance between ensuring broad support for measures taken, and avoiding approaches that lead to weak conservation outcomes;
- 2.7 contains monitoring, review and compliance and dispute settlement provisions designed to promote its effective implementation, and financial arrangements that are cost effective and efficient;

Area based management tools, including marine protected areas

- 2.8 facilitates the establishment of multi-sector area-based management tools as well as an interconnected network of ecologically representative, highly protected marine protected areas to enable comprehensive ecosystem-based management and effective protection of the marine biodiversity in ABNJ;
- 2.9 complements, rather than replaces, the competence of existing regional and sectoral organisations and ensure that these bodies are able to continue to exercise their mandates;
- 2.10 fosters consistency and progressive improvement across the oceans governance regime through the establishment of common standards and guidelines on the establishment of area-based management tools and marine protected areas;
- 2.11 enables the COP to make recommendations to other relevant bodies and, ideally, be able to impose interim or emergency measures when needed;

Environmental impact assessments

- 2.12 effectively operationalises the existing United Nations Convention on the Law of the Sea rules on environmental impact assessments for all activities conducted in ABNJ in order to protect and preserve the marine environment;
- 2.13 establishes thresholds, processes and guidelines for the conduct and reporting of environmental impact assessments, including cumulative impacts, adaptive management and strategic environmental assessments, drawing on existing standards and guidelines developed by international organisations and promoting transparency and compliance, ^{s9(2)(j)}
- 2.14 recognises the existing responsibilities of states and roles of regional and sectoral organisations and mechanisms for the conduct of environmental impact assessments in ABNJ;
- 2.15 ^{s9(2)(j)}

Marine genetic resources and sharing of benefits

- 2.16 creates a pragmatic sui generis regime for access to marine genetic resources in ABNJ, which includes mechanisms for equitable sharing of benefits while respecting existing intellectual property rights and intellectual property law;
- 2.17 encourages research into marine genetic resources in ABNJ, incentivises comprehensive knowledge-sharing, encourages cooperation and compliance, and manages the environmental impacts of activities related to marine genetic resources;
- 2.18 ^{s9(2)(j)}

Capacity building and the transfer of marine technology

- 2.19 facilitates the full and effective participation of developing countries, including Pacific Island states, in the conservation and sustainable use of marine biodiversity in ABNJ and in the sharing of knowledge from marine genetic resources;
- 2.20 strengthens the implementation and coordination of capacity building;
- 2.21 ^{s9(2)(j)}

- 3 **agreed** that in circumstances where officials consider further Ministerial instruction is needed, for example, if the treaty being put to a vote is substantively inconsistent with the mandate approved above, the Minister of Foreign Affairs, the Minister for Oceans and Fisheries, the Minister for the Environment, and the Minister of Conservation have the power to act and take decisions on New Zealand's voting position.

Janine Harvey
Committee Secretary

Present:

Rt Hon Jacinda Ardern (Chair)
Hon Kelvin Davis
Hon Chris Hipkins
Hon Andrew Little
Hon David Parker
Hon Damien O'Connor
Hon Peeni Henare
Hon Michael Wood
Hon Dr David Clark
Hon Kieran McAnulty

Officials present from:

Office of the Prime Minister
Officials Committee for ERS

Office of the Minister of Foreign Affairs

Chair, Cabinet External Relations and Security Committee

Updated negotiating mandate for new UN treaty on marine biodiversity of areas beyond national jurisdiction

Proposal

- 1 This paper seeks approval of an updated mandate for Aotearoa New Zealand's participation in the final stages of negotiations on a new treaty on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. It expands on the 2018 mandate agreed by Cabinet in July 2018 (CAB-18-MIN-0363).

Executive summary

- 2 The fifth, and hopefully final, round of negotiations on a new international treaty under the United Nations Convention on the Law of the Sea (UNCLOS) on conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the Global Oceans Treaty or BBNJ) will be held at the UN in New York in August 2022.
- 3 Areas beyond national jurisdiction (ABNJ) make up two thirds of the ocean. The BBNJ treaty is intended to address increasing pressures on marine biodiversity in these areas and fill legal and regulatory gaps in the existing relevant framework. Pressure on the biodiversity in ABNJ is increasing due to human activities and environmental stressors such as climate change. Both existing activities (such as shipping, seabed mining and fishing) and new uses of the ocean (such as geoengineering) are expected to intensify due to population growth, increased demand, resource scarcity and improved technology.
- 4 The BBNJ treaty is ultimately about kaitiakitanga – countries' common stewardship responsibilities for the ocean and its resources. The treaty will provide a platform for improved international cooperation to fulfil these responsibilities by strengthening rules, frameworks and tools to underpin collective action to ensure the conservation and sustainable use of marine biodiversity. In launching the negotiations, UN member states agreed that BBNJ will supplement the current oceans governance framework set up under UNCLOS in such a way that builds on and does not undermine existing legal instruments and frameworks and relevant global, regional and sectoral bodies such as Regional Fisheries Management Organisations (RFMOs) and the Antarctic Treaty System.
- 5 New Zealand's overarching goal continues to be a treaty that halts the decline and promotes the restoration, conservation and sustainable use of marine biodiversity in ABNJ. For New Zealand, it is important that this goal is achieved in a way that respects existing rules and institutions, ^{s9(2)(j)} recognises the interests of coastal states whose maritime zones are adjacent to ABNJ, factors in Maori interests concerning biodiversity in ABNJ, and supports the aspirations of our Pacific partners.

6 s6(a)

7 There is currently no global mechanism to establish ABMTs and MPAs that protect against the full range of threats to biodiversity in ABNJ. Accordingly, I propose New Zealand support a treaty that facilitates the establishment of multi-sector ABMTs, as well as a network of ecologically representative, highly protected MPAs to enable effective protection of the marine biodiversity in ABNJ. The new treaty should also foster consistency and progressive improvement across the oceans governance regime. With respect to EIAs, I propose New Zealand supports a treaty that effectively operationalises the UNCLOS rules on impact assessment in order to protect and preserve the marine environment.

8 BBNJ will also cover access to, and benefit sharing from, marine genetic resources (MGRs). Reaching agreement on this aspect will be key to concluding the negotiations. s6(a), s9(2)(j)

9 I propose New Zealand support a pragmatic *sui generis*¹ regime for access to MGRs in ABNJ, which includes mechanisms for equitable sharing of benefits, while respecting existing international property rights. This regime should encourage research into MGRs and manage the environmental impacts from this. s9(2)(j)

It will be also important that the treaty facilitates the participation of developing countries in the conservation and sustainable use of biodiversity in ABNJ, taking into account the specific needs of Pacific Island states.

10 The Ministry of Foreign Affairs and Trade leads New Zealand's negotiating team, with support from the Department of Conservation, the Ministry for Primary Industries and the Ministry for the Environment. Extensive consultation has been undertaken with a wide group of interested stakeholders whose views have been taken into account in preparing this paper. Separately, consultation with Māori has occurred with a dedicated Māori Working Group.

Background

11 In December 2017, the United Nations launched negotiations on a new legally binding agreement on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ). Once concluded, BBNJ will be the third implementing agreement under UNCLOS. The **Annex** to this paper outlines the current UNCLOS framework, its gaps regarding biodiversity and abbreviations used in this paper.

¹ Unique or stand-alone.

- 12 BBNJ is organised around four substantive topics:
- a. marine genetic resources (MGRs), including issues of benefit sharing;
 - b. area-based management tools (ABMTs), including marine protected areas (MPAs);
 - c. environmental impact assessments (EIAs); and
 - d. capacity building and the transfer of marine technology.
- 13 Four negotiating sessions have been held since 2017. Substantial progress has been made on the objective and general principles underpinning the treaty, convergence on a global framework for the creation of ABMTs and MPAs, and on the requirements for EIAs for activities in ABNJ. There remain a number of significant issues to be resolved, particularly on an access and benefit sharing regime for MGRs. At the end of the fourth negotiating session in March 2022, states agreed to have a fifth session in August 2022, with a view to finalising and adopting the text of the new treaty.
- 14 States' views on BBNJ are generally influenced by their level of conservation ambition and their sense of how they stand to benefit from the use of marine biodiversity. New Zealand is a member of the EU-led High Ambition Coalition focused on achieving a treaty in 2022.² New Zealand has tended to work closely in the negotiations with Australia, Canada and Norway. New Zealand has also worked consistently to support Pacific Island countries' aspirations for BBNJ. The Pacific Island countries are playing a coordinated and active role in the negotiations, reflecting important economic, social and cultural interests in the oceans. New Zealand officials have engaged closely with Pacific negotiators to establish common interests and ensure that the interests of adjacent coastal states, the special circumstances of small island developing states, the value of traditional knowledge and the role of indigenous peoples and local communities are all reflected in the agreement.
- 15 A tension exists between the urgency to finalise a treaty with strong environmental outcomes and the need to achieve broad support, including from those states responsible for the majority of high seas activities (distant water fishing, shipping and exploratory seabed mining activities). A treaty without their support would have limited effectiveness. s6(a), s9(2)(j)

New Zealand's updated negotiating mandate

Overarching goal

- 16 I propose New Zealand's overarching goal for the new treaty continues to be:

² Composed of the EU and 20 other countries including: Australia, Canada, Chile, Costa Rica, India, Mexico, Morocco, Namibia, Norway, Singapore and the UK.

To halt the decline and promote the restoration of marine biodiversity in areas beyond national jurisdiction through establishing an effective global regime for cooperation and coordination between states and international, regional and sectoral organisations, to improve the conservation and sustainable use of marine biodiversity in ABNJ.

Scope, principles, and relationship to other agreements, frameworks and organisations

- 17 There is general support for a text that covers all existing and new activities and sectors impacting on marine biodiversity in ABNJ with respect to the four substantive elements identified in paragraph 12 above. Discussions are still ongoing on the general principles to be reflected in the treaty but there is increasing convergence and it should be possible to agree on a set of principles and approaches.
- 18 I propose New Zealand continues to support the following principles and approaches as underpinning the new treaty:

Kaitiakitanga or stewardship of the marine environment; the precautionary approach; an ecosystem based approach; the use of best available science and information; recognition of cumulative impacts on the marine environment; good governance (including transparent and accountable decision making); cost-effectiveness and efficiency; and other relevant principles of international law such as the principle of equity, the polluter-pays principle, and the avoidance of transboundary harm.

- 19 It is agreed that BBNJ should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral organisations. I consider that BBNJ should encourage improvement across the existing legal and regulatory framework applying to ABNJ. It should complement, fill gaps, and lift the standards of – but not replace – existing arrangements. It should achieve its conservation objectives while respecting the balance of rights and responsibilities that exists in the law of the sea and the competence of existing institutions, such as RFMOs, to carry out their roles. s9(2)(j)
- 20 Therefore, with respect to the relationship with other agreements, frameworks and organisations, I propose that New Zealand support a new treaty that can:

Establish clear global standards and mechanisms to identify and implement marine conservation objectives, to be delivered by existing organisations to the extent possible, and by the BBNJ COP in other cases. This will involve promoting coordination between states, the BBNJ COP and these organisations, and lifting the performance of existing organisations.

Other cross-cutting issues

- 21 First, New Zealand has worked with Pacific Island states and other coastal states to ensure the new treaty recognises the interests of coastal states whose maritime zones are adjacent to ABNJ. This includes appropriate consultation of coastal states when measures or activities are proposed in adjacent areas and

requiring the BBNJ COP to give due regard to the interests of coastal states when making decisions.

- 22 Second, while the treaty will apply only to ABNJ, some taonga species migrate between New Zealand and ABNJ³. Given Māori interests in these species, including the genetic information originating from them, as well as Māori interests in the oceans, New Zealand's position should also be guided by the need to give active consideration of Māori interests, including kaitiakitanga and taonga species.
- 23 Third, New Zealand has worked with Pacific Island states and others to ensure BBNJ is able to give due consideration to traditional knowledge in decision-making on biodiversity in ABNJ. Such knowledge is likely to come from indigenous peoples and local communities living adjacent to ABNJ – for example Māori and Pacific Island peoples in our region – and the use of this knowledge should be subject to the principle of free, prior and informed consent. These efforts have been met with general support, and I propose that New Zealand continue to prioritise inclusion of these elements in the treaty to enable the consideration of relevant mātauranga Maori.
- 24 Fourth, decision-making procedures for the BBNJ COP are still under discussion. New Zealand's interests will be best met by decision-making processes that ensure broad support for decisions s9(2)(j) while avoiding wide-ranging opt-outs or a requirement for consensus-only decisions, which would undermine the effectiveness of the agreement or allow one state to block decisions).
- 25 Fifth, monitoring, review, compliance, dispute settlement mechanisms will be important in ensuring the effective functioning of the treaty, and to ensure that states are meeting their obligations. I propose that New Zealand continue to support mechanisms for this purpose, which will promote the effective implementation of the treaty without being unnecessarily burdensome. New Zealand should support dispute settlement procedures which provide coherence with those already applicable under UNCLOS and other related agreements, including the ability for the BBNJ COP to seek advisory opinions on points of law from the International Tribunal on the Law of the Sea (ITLOS).
- 26 Finally, the scope of financial resources needed to implement the treaty and the precise financial mechanisms are yet to be determined. It is expected that assessed contributions by states parties will fund the administrative and secretariat functions of the treaty, consistent with normal practice for multilateral treaties.
- 27 Therefore, with respect to cross-cutting issues, I propose that New Zealand support a treaty that:

Recognises the interests of coastal states whose maritime zones are adjacent to ABNJ, and enables New Zealand to actively consider Māori interests in ABNJ, including kaitiakitanga and taonga species, and traditional knowledge and mātauranga Māori. Decision-making procedures should empower the BBNJ COP to take effective decisions and strike a balance between ensuring broad support for measures taken,

³ For example, the highly migratory tītī (muttonbird or sooty shearwater), toroa (albatross), tohorā (whales), and tuna (longfin eel).

while avoiding approaches that lead to weak conservation outcomes. The treaty should contain monitoring, review, compliance and dispute settlement provisions designed to promote its effective implementation, and cost effective and efficient financial arrangements.

Area-based management tools, including marine protected areas

- 28 One of the most significant ways in which BBNJ will improve ocean health and conservation is by enabling the establishment of multi-sector area-based management tools and MPAs that protect against the full range of threats to biodiversity in ABNJ. There is currently no global mechanism to establish these. While some multi-sector and single-sector ABMTs and MPAs have been established by some international, regional or sectoral bodies in ABNJ, they are usually narrow in scope and can be undermined by other activities outside those sectors (e.g. seabed mining activities could be permitted in an area closed to fishing to protect vulnerable marine ecosystems).
- 29 New Zealand's interest is a treaty that facilitates the establishment of a comprehensive system of multi-sector ABMTs to support conservation and sustainable use outcomes, as well as the creation of an interconnected network of ecologically representative, highly protected MPAs. As discussed above, I consider that the new treaty should complement rather than replace existing arrangements and ensure that these bodies are able to continue to exercise their role. I also consider that BBNJ should foster consistency and progressive improvement across the oceans governance regime through the establishment of common standards and guidelines on the establishment of ABMTs and MPAs. In addition, in order to be credible, MPAs should have the long-term conservation of marine biodiversity and ecosystems as their primary stated objective.
- 30 How the BBNJ will interact with other relevant regional and sectoral bodies is a key outstanding issue in this part of the negotiation. Some states and environmental NGOs want the BBNJ COP to be able to establish MPAs and related measures in areas where competent bodies have decided not to, or have been unable to reach agreement. Many other states, however, want the powers of the BBNJ to be limited to imposing measures that are complementary to those adopted by other competent bodies and making recommendations to these bodies. This later view is more likely to prevail.
- 31 Relevant to this debate, New Zealand has proposed that the BBNJ COP should have the capacity to adopt measures on an interim or emergency basis, where there are serious threats to marine biological diversity that cannot be managed in a timely manner through the application of other provisions of BBNJ or by other relevant legal instruments or frameworks. Such measures would be temporary, would lapse after a certain time if not replaced by an ABMT, and are not designed to supplant measures from other competent bodies (which may also have the ability to impose emergency or interim measures).^{s9(2)(j)}
- 32 I therefore propose that with respect to ABMTs and MPAs, New Zealand advocate for a treaty that:

Facilitates the establishment of a comprehensive system of multi-sector AMBTs, as well as a network of ecologically representative, highly protected MPAs to enable comprehensive ecosystem-based management and effective protection of the marine biodiversity in ABNJ. The new treaty should complement rather than replace the competence of existing regional and sectoral organisations and ensure that these bodies are able to continue to exercise their mandates. It should also foster consistency and progressive improvement across the oceans governance regime through the establishment of common standards and guidelines on ABMTs and MPAs. The BBNJ COP should have the ability to make recommendations to other relevant bodies, and ideally, be able to impose interim or emergency measures when needed.

Environmental impact assessments

- 33 UNCLOS contains general requirements on states to assess the environmental impacts of activities in the marine environment, but these are not well articulated or implemented. Some existing regimes require EIAs as a precondition (for example deep sea fishing) but there are no overarching globally-agreed standards or thresholds for EIAs in ABNJ, and existing regimes do not enable consideration of cumulative impacts or impacts of new activities such as marine energy installations. Further, some existing regimes consider environmental impacts only within a specific sector (e.g. fishing), so states that do not have an interest in that sector are not part of the decision-making process. BBNJ, therefore, provides an opportunity to set out an integrated framework that ensures EIAs are conducted consistently and comprehensively in ABNJ.
- 34 New Zealand's interests in this area include ensuring the protection of the marine environment by lifting standards for, and clarifying the processes and rules applicable to, the conduct of EIAs for activities in ABNJ. This includes enabling consideration of cumulative impacts, adaptive management⁴ and strategic environmental assessments⁵. We also have an interest in ensuring the EIA provisions in BBNJ are not unduly burdensome and respect the rights and interests of coastal states (including where activities in ABNJ may have impacts on EEZs), and international bodies with competence to conduct EIAs.
- 35 There is broad agreement that UNCLOS requires EIAs, on what constitutes an acceptable EIA, and that the BBNJ COP should have some level of oversight. The main area of disagreement is the extent of this oversight and whether the BBNJ COP should approve EIAs. s9(2)(j)

⁴ An intentional approach to making decisions and adjustments in response to new information and changes in context.

⁵ A higher level assessment process to assess environmental impacts associated with a program, plan, or policy

s9(2)(j)

36 s9(2)(j)

It will also be important to ensure that there is adequate support for those countries such as small island developing states lacking the capacity to conduct EIAs.

37 Another issue still to be resolved is the threshold and triggers giving rise to the requirement to conduct an EIA, and how states assess whether the threshold is met. The options under consideration range from capturing any activity having a minor or transitory effect through to only those that may cause substantial pollution and harmful changes to the marine environment (the UNCLOS threshold). s9(2)(j)

38 Accordingly, with respect to EIAs, I propose that New Zealand support a treaty that:

Effectively operationalises the existing UNCLOS rules on EIAs in order to protect and preserve the marine environment by establishing thresholds, processes and guidelines for conducting and reporting assessments for all activities in ABNJ. This includes consideration of cumulative impacts, and providing for adaptive management and strategic environmental assessments, while drawing on existing international standards and promoting transparency and compliance. The treaty should recognise the existing responsibilities of states and regional and sectoral organisations. s9(2)(j)

Marine genetic resources and sharing of benefits

39 Marine genetic resources – genetic materials of value obtained from a marine organism – were essentially unknown when UNCLOS was negotiated. There is therefore no applicable regime for access and use of MGRs in ABNJ and BBNJ is expected to fill this gap. The question of fair and equitable benefit sharing from access and use of MGRs, and what should be included in this concept, will be key to agreeing the final text of the treaty.

40 s9(2)(j)

s9(2)(j)

- 41 Equitable sharing of benefits derived from collection and use of MGRs is important to developing states, including Pacific Island countries. Most want the concept of *common heritage of mankind*⁶ to underpin the MGR regime, and some have also sought specific rules on intellectual property for MGRs and fees to access these genetic resources. Others are concerned that such prescriptions would deter beneficial scientific research and want the *freedom of the high seas* to continue to apply to use of MGRs. New Zealand has supported the concept of fair and equitable sharing of benefits, and that this should cover both benefits accruing from access to MGRs (e.g. supporting spaces on research cruises for other countries) and their use (e.g. sharing the findings of research).
- 42 In order to reach agreement on a BBNJ treaty, it will be necessary to find a pragmatic *sui generis* solution to access and benefit sharing. s9(2)(j)
- 43 I therefore propose that with respect to MGRs, New Zealand be ready to support a treaty that:

Creates a pragmatic *sui generis* regime for access to MGRs in ABNJ, which includes mechanisms for equitable sharing of benefits while respecting existing intellectual property rights. The regime should encourage research into marine genetic resources in ABNJ, incentivising comprehensive knowledge-sharing, encouraging cooperation and compliance, and manage the environmental impacts of activities related to marine genetic resources. s9(2)(j)

Capacity building and the transfer of marine technology

- 44 New Zealand, as party to UNCLOS and its two implementing agreements, has existing obligations to promote the development of marine scientific capacity in developing states and to promote the transfer of marine science and technology.
- 45 Developing states want to build their capacity on MGRs and related technologies. They consider that existing arrangements have not met their needs and want BBNJ to make capacity building and the transfer of marine technology mandatory. Developed states prefer the existing voluntary approach because of concerns about marine technology which is usually privately owned.

⁶ This principle currently applies only to deep seabed mineral resources in ABNJ.

s9(2)(j)

- 46 Accordingly, and consistent with New Zealand's support for addressing the needs of Pacific Island states, I propose that New Zealand support a treaty that:

Facilitates the full and effective participation of developing countries – including, in particular, Pacific Islands states - in the conservation and sustainable use of biodiversity in ABNJ and in the sharing of knowledge from marine genetic resources. This should include provisions that strengthen the implementation and coordination of capacity building. s9(2)(j)

Conclusion of the negotiations

- 47 As the fifth negotiating round in August is intended to be the final round, it is hoped that a treaty text will be adopted by consensus, or by a vote representing near consensus, at the end of the session, or by the UN General Assembly in the weeks following.
- 48 In circumstances where officials consider further Ministerial instruction is needed, for example, if the treaty being put to a vote is substantively inconsistent with this mandate, I propose that the Minister of Foreign Affairs, the Minister of Oceans and Fisheries, and the Minister for Conservation should have the power to act and take decisions on New Zealand's voting position on the text. As with all international treaties, the treaty would only become binding on New Zealand following signature and ratification.

Consultation

- 49 The following agencies were involved in development of this paper: Ministry of Foreign Affairs and Trade, Department of Conservation, Ministry for Primary Industries, the Ministry for the Environment. The following agencies were consulted: Ministry of Transport, Te Puni Kōkiri, Ministry of Business, Innovation and Employment and Treasury.
- 50 In preparation of this paper, officials held four stakeholder workshops in May and June 2022 focussing on the different areas of BBNJ and the key outstanding issues, which were well attended by representatives of environmental NGOs, representatives from the fishing industry and the cable laying industry, scientists, and academics. There is a continued interest from these stakeholders to continue to be consulted.
- 51 Most stakeholders view BBNJ as an opportunity to develop international environmental law and improve marine conservation, but differ on their assessment of the effectiveness of existing bodies managing activities in ABNJ (fishing, shipping and mining), and on how much of a role these bodies should have in implementing the new treaty. New Zealand's positions are broadly aligned with those of the environmental NGOs s9(2)(g)(i)

s9(2)(g)(i) Environmental stakeholders strongly support the inclusion of strategic environmental impact assessments in the treaty and New Zealand's proposal that the BBNJ COP be able to adopt interim and emergency measures.

- 52 Officials met on 20 June with the Māori Working Group, which has been engaged in discussions on the BBNJ negotiations since 2018. Key priorities identified in discussions with this group include: the application of kaitiakitanga to the ABNJ and the interests of coastal states; the opportunity to improve protection of Taonga species that migrate through the high seas between New Zealand's waters and those of our Pacific neighbours; the ability to take account of traditional knowledge of indigenous peoples related to the conservation and sustainable use of biodiversity and the conditions for the use of this knowledge; and the regulation of an access and benefit sharing regime and implications for any future such regime in Aotearoa New Zealand.
- 53 Officials have also consulted Tokelau during the course of negotiations, as Tokelau has a strong interest in fisheries and oceans issues but does not directly participate in the negotiations. Officials consider that Tokelau's interests in the negotiations closely mirror those of New Zealand. Officials will undertake further consultation with Tokelau in advance of the August negotiating round.
- 54 Officials will continue to undertake ongoing-targeted consultation with interested stakeholders, particularly through engagement with the High Seas Alliance which is a coalition of 40+ civil society organisations focused on protection of the high seas. There will also be the option for some stakeholders and Māori representatives to seek inclusion in the New Zealand delegation to the negotiations as non-governmental participants, on a self-funded basis, in accordance with the Cabinet Procedures for Including Non-Official Representative on Official Delegations to International Meetings (CO (00)14).

Proactive release

- 55 This paper will be proactively released with appropriate redactions within 30 days of its confirmation by Cabinet.

Financial implications

- 56 The financial implications of the proposed treaty will depend on the final outcome of negotiations. While it is not possible to quantify costs at this stage, they will be known before a decision is taken for New Zealand to sign and ratify the treaty and would be part of advice to Cabinet at that time. The majority of costs are likely to relate to the administrative functions of any new Secretariat, including servicing meetings of parties to the treaty. For example, New Zealand makes an annual contribution of around USD 28,901 to the International Seabed Authority. An associated cost will be the cost of New Zealand's participation in the meetings of the BBNJ bodies.

Human rights

- 57 There are no expected inconsistencies with the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990.

Legislative implications

- 58 Some changes to legislation or regulations may be required to implement the treaty, for example to ensure New Zealand vessels comply with EIA requirements and requirements for accessing MGRs. If implementing legislation is required, Cabinet would be informed at the time approval was sought to ratify or accede to the treaty.

Regulatory impact analysis

- 59 An extended National Interest Analysis (incorporating a Regulatory Impact Analysis) will be presented to Cabinet when negotiations have concluded and approval is sought to ratify or accede to the treaty.

Recommendations

- 60 The Minister of Foreign Affairs recommends that the Committee:
- 1 **Note** that the fifth, and potentially final, round of negotiations on a legally binding international treaty, under the United Nations Convention on the Law of the Sea, on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ) will take place in New York in August 2022;
 - 2 **Agree** that New Zealand support a treaty that:

Overarching goal

- 2.1. Halts the decline and promotes the restoration of marine biodiversity in areas beyond national jurisdiction (ABNJ) through establishing an effective global regime for cooperation and coordination between states and regional and international organisations to improve the conservation and sustainable use of marine biodiversity in ABNJ;

Scope, principles, and relationship to other agreements, frameworks and organisations

- 2.2. Covers all existing and new activities and sectors impacting on marine biodiversity in ABNJ and sets out clear rules and processes for environmental impact assessments (EIAs), area based management tools (ABMTs) and marine protected areas (MPAs), and access to marine genetic resources (MGRs), supported by provisions on capacity building and technology transfer;
- 2.3. Is underpinned by the principles and approaches set out in paragraph 18;
- 2.4. Establishes clear global standards and mechanisms to identify and implement marine conservation objectives, to be delivered by existing organisations to the extent possible, and by the BBNJ Conference of Parties (COP) in other cases, thereby promoting coordination between states, the BBNJ COP and these organisations, and lifting the performance of existing organisations;

Other cross-cutting issues

- 2.5. Recognises the interests of coastal states whose maritime zones are adjacent to ABNJ, and enables New Zealand to actively consider Māori interests in ABNJ, including kaitiakitanga and Taonga species, and the application of traditional knowledge and mātauranga Māori;
- 2.6. Contains decision making procedures that empowers the COP to take effective decisions and which strike a balance between ensuring broad support for measures taken, and avoiding approaches that lead to weak conservation outcomes;
- 2.7. Contains monitoring, review and compliance and dispute settlement provisions designed to promote its effective implementation, and financial arrangements that are cost effective and efficient;

Area based management tools, including marine protected areas

- 2.8. Facilitates the establishment of multi-sector area-ABMTs as well as an interconnected network of ecologically representative, highly protected MPAs to enable comprehensive ecosystem-based management and effective protection of the marine biodiversity in ABNJ;
- 2.9. Complements rather than replaces the competence of existing regional and sectoral organisations and ensure that these bodies are able to continue to exercise their mandates;
- 2.10. Fosters consistency and progressive improvement across the oceans governance regime through the establishment of common standards and guidelines on the establishment of ABMTs and MPAs;
- 2.11. Enables the COP to make recommendations to other relevant bodies, and ideally, be able to impose interim or emergency measures when needed;

Environmental impact assessments

- 2.12. Effectively operationalises the existing UNCLOS rules on EIAs for all activities conducted in ABNJ in order to protect and preserve the marine environment;
- 2.13. Establishes thresholds, processes and guidelines for the conduct and reporting of EIAs – including cumulative impacts, adaptive management and strategic environmental assessments – drawing on existing standards and guidelines developed by international organisations and promoting transparency and compliance, ^{s9(2)(j)}
- 2.14. Recognises the existing responsibilities of states and roles of regional and sectoral organisations and mechanisms for the conduct of EIAs in ABNJ;

2.15. s9(2)(j)

Marine genetic resources and sharing of benefits

2.16. Creates a pragmatic sui generis regime for access to MGRs in ABNJ, which includes mechanisms for equitable sharing of benefits while respecting existing intellectual property rights and intellectual property law;

2.17. Encourages research into MGRs in ABNJ, incentivises comprehensive knowledge-sharing, encourages cooperation and compliance, and manages the environmental impacts of activities related to MGRs;

2.18. s9(2)(j)

Capacity building and the transfer of marine technology

2.19. Facilitates the full and effective participation of developing countries – including Pacific Island states – in the conservation and sustainable use of marine biodiversity in ABNJ and in the sharing of knowledge from MGRs;

2.20. Strengthens the implementation and coordination of capacity building; and

2.21. s9(2)(j)

3 **Agree** that in circumstances where officials consider further Ministerial instruction is needed, for example, if the treaty being put to a vote is substantively inconsistent with this mandate, the Minister of Foreign Affairs, the Minister for Oceans and Fisheries, the Minister for the Environment, and the Minister of Conservation should have the power to act and take decisions on New Zealand's voting position.

Rt Hon Nanaia Mahuta

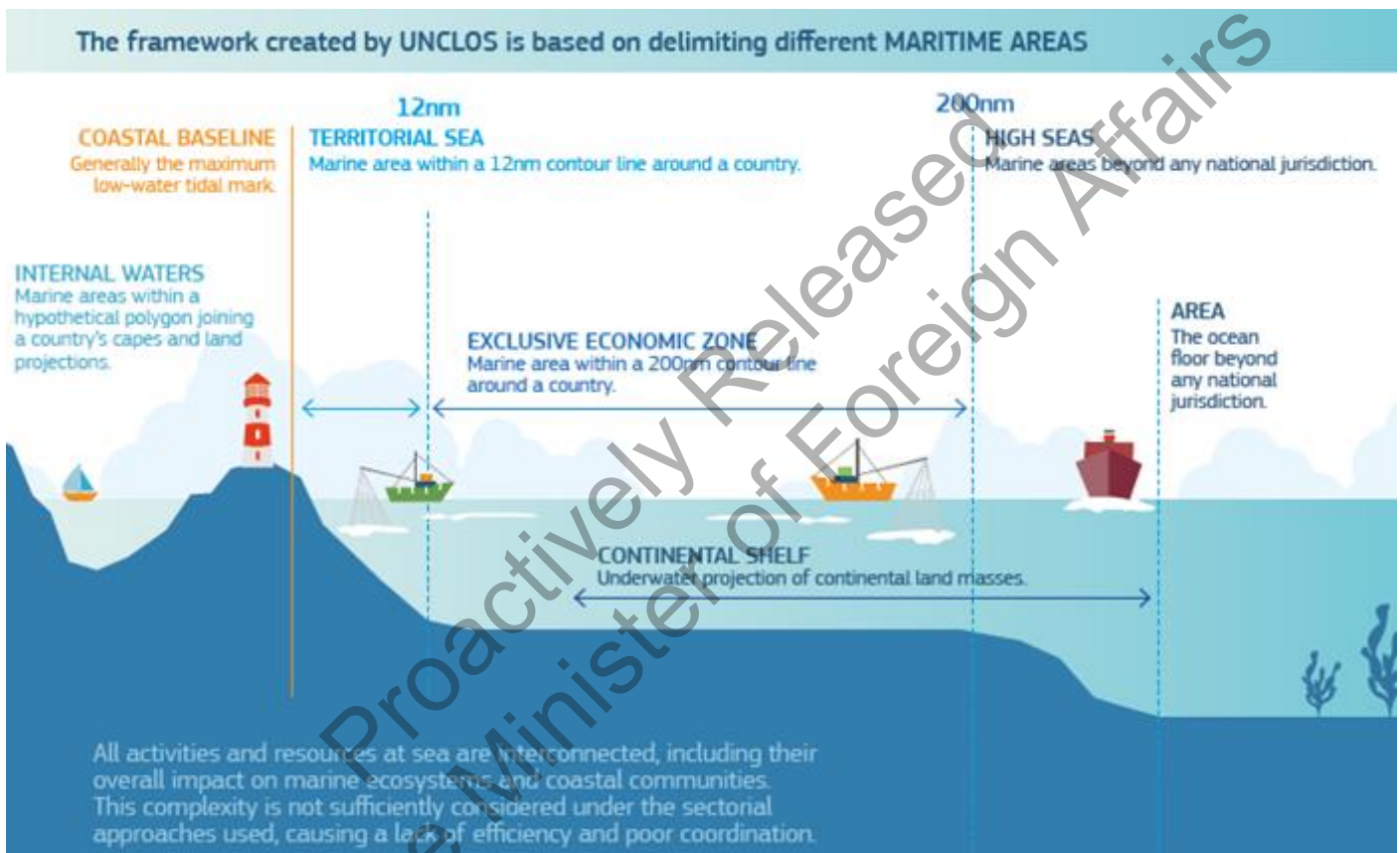
Minister of Foreign Affairs

Annex: Legal and regulatory framework governing use of and activities in ABNJ

UN Convention on the Law of the Sea does not explicitly deal with biodiversity.

The UN Convention on the Law of the Sea (UNCLOS) provides the international legal framework governing all activities in the ocean and seas, including those related to, *inter alia*, seabed minerals, fisheries, environmental protection and marine pollution.

The UNCLOS framework is based on delimiting different maritime areas. As depicted below, the two areas that are beyond national jurisdiction (ABNJ) are the high seas beyond the exclusive economic zone and the seabed beyond the continental shelf.



Source: European Commission (2015) *International Ocean Governance* [Infographic].

At the time UNCLOS was negotiated, ABNJ and the resources within them were more inaccessible and less well understood than they are today. As a result, while UNCLOS sets out states' rights and obligations over the living resources of the high seas and the mineral resources of the Area, it is silent on the legal regime for marine genetic resources that originate in ABNJ. It does not refer explicitly to marine biodiversity either.

Accordingly, 30 years after its negotiation, states have decided to negotiate a third implementing agreement to UNCLOS to include more comprehensive provisions relating to marine biodiversity in ABNJ.

Existing instruments are sector-specific

Within the UNCLOS framework, there are existing treaties and international organisations regulating particular activities. However, these relate to specific sectors of activity, such as fishing, seabed mining and shipping, rather than encompassing all activities that take place in the ocean. Two supplementary treaties – known as implementing agreements – to UNCLOS were negotiated in the 1990s; one on seabed mining in ABNJ and the other on fish stocks that move between the high seas and states' maritime zones.

The International Seabed Authority regulates all mineral related activity in the seabed beyond national jurisdiction. The International Maritime Organization oversees a range of treaties regulating shipping and associated marine pollution. Most high seas fisheries are managed by an RFMO under a treaty for that area or fish stock. Some regions have “regional seas conventions” focused on the marine environment in that part of the world.

The sector-specific mandates of these treaties and bodies means they cannot address the full range of impacts on biodiversity from increasing activity in ABNJ. First, existing regimes may regulate specific activities, and in some cases their impacts on marine biodiversity, but they do not have a mandate for the conservation and sustainable use of marine biodiversity in general.

Secondly, cumulative impacts cannot be assessed or managed under the current sectoral management of activities in ABNJ. Thus, while States are obliged by UNCLOS to conduct environmental impact assessments for certain activities in ABNJ, there are no overarching internationally agreed standards, reporting mechanisms or requirements to consider the cumulative impact of other uses and implementation is inconsistent.

Abbreviations used in this paper

UNCLOS: United Nations Convention on the Law of the Sea

BBNJ: Agreement 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.

ABNJ: the area beyond national jurisdiction

AMBTs: area based management tools

MPAs: marine protected areas

MGRs: marine genetic resources

RFMOs: regional fisheries management organisations