

# Advancing participation in the conservation & sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ)

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## Abstract

Participation of civil society in the negotiations on marine biodiversity of areas beyond national jurisdiction (BBNJ) remains limited and below the standards adopted under other multilateral environmental negotiations (Morgera et al., 2022), both in terms of participation and access to information. This policy brief underscores that public participation in the future implementation of the BBNJ Agreement is an international human rights issue, particularly with regard to Indigenous and local knowledge (ILK) holders and children. Participation is necessary to ensure that the most affected are not excluded from determining the future of our ocean and all the dimensions of human wellbeing that depended on it (Morgera et al., 2022).

Public participation should be informed by existing international human rights obligations of the States participating in the BBNJ negotiations as a response to the recommendation by the UN Special Rapporteur on Human Rights and the Environment that the BBNJ negotiations should consider human rights (Boyd, 2020). This policy brief also underscores that capacity-building under the BBNJ Agreement needs to support public participation in the implementation of the Agreement, as well as knowledge sharing and co-production. The policy brief includes specific textual recommendations to inform the upcoming session of the Intergovernmental Conference from 15th to 26th August 2022. All comments refer to the latest revised draft text of the BBNJ Agreement prepared by the President of the Intergovernmental Conference in July 2022.



## KEY POINTS

BBNJ negotiators should:

1. include specific provisions on public participation in the implementation of the BBNJ Agreement, including non-state actors that represent relevant human rights holders
2. develop modalities to enable meaningful participation characterised by an iterative dialogue and mutual learning on ocean stewardship
3. develop specific modalities for the meaningful participation by representatives of Indigenous and local knowledge holders and by children and young people, to support the respectful integration of their knowledge in all the elements of a new instrument
4. develop provisions on building the capacity of relevant human rights holders to participate in the implementation of the BBNJ Agreement.

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## The need for participation, cooperation and collaboration with civil society

Reviewing the implementation challenges of area-based management tools (ABMT) for BBNJ, de Santo (2018) argues that 'equitable and transparent stakeholder engagement and participation' needs to be a priority. Indeed, research suggests that inclusive approaches can help minimise conflict (Gaebel et al., 2020), as well as promoting environmental justice (Blue et al., 2021; Morgera et al., 2022). Moreover, enhanced participation can clarify respective roles in

acting as 'stewards of the ocean', thereby advancing cooperation and collaboration at different scales (Rudolph et al., 2020; Morgera et al., 2022; Strand et al., 2022). Enhanced participation, with a view to moving towards co-designing solutions to protect the ocean's health, would also lead to an increase in shared responsibilities, and could counteract the continued disagreement between states on draft provisions of the BBNJ Agreement (Humphries and Harden-Davies, 2020).

Fundamentally, public participation is an international human rights issue.



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Firstly, for individuals, communities and groups of people 'who rely directly on the products of ...the oceans for their food, fuel and medicine', as well as that have cultural connections to the ocean, environmental harm can have 'disastrous consequences' from a human rights perspective (Knox, 2018a). This is also true of biodiversity loss in areas beyond national jurisdiction (ABNJ) due to the ecological connectivity in marine and coastal ecosystems, which refers to 'movement of organisms, materials and energy between habitat units within seascapes' (Bishop et al., 2017), where marine resource exploitation, coral reef connectivity and circulation connectivity through currents also impact different coastal areas (Kelly et al., 2021). Negative impacts on human rights arising from biodiversity loss in ABNJ will be felt therefore by communities in those countries with strongest connectivity to ABNJ (Popova et al, 2019).

More generally, the full enjoyment of everyone's human rights to life, health, food, and water depend on healthy ecosystems (Knox, 2018a), including marine ecosystems in ABNJ (Boyd, 2020). Ecosystem services from the deep sea benefit not just specific groups of people, but global society, supporting a habitable planet in different ways that underpin multiple aspects of human health and wellbeing (Thurber et al., 2014; La Bianca et al., submitted), including by

## TEXTUAL SUGGESTION:

### Preamble

**Acknowledging that the conservation of marine biodiversity of areas beyond national jurisdiction is a common concern of humankind, Recognizing** the need to address, in a coherent and cooperative manner, biodiversity loss and degradation of ecosystems of the ocean, due to, in particular, climate change, pollution and overuse, **taking into account respective international obligations on human rights,**

### Article 5 - General principles and approaches

In order to achieve the objective of this Agreement, Parties shall be guided by the following:

(i) The respect, promotion and consideration of their respective obligations **relating to human rights, including** the rights of indigenous peoples and local communities, **and children**, when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;

### Article 48 bis Transparency

5. "The rules of procedure of the Conference of the Parties shall provide for modalities for such participation, **giving adequate opportunity for the public to express views** and **shall provide for narrowly construed restrictions as an exception.** The rules of procedure shall also provide for such representatives to have timely, **affordable and effective** access to all relevant information."

### Article 51 Clearing-house mechanism

3. The clearing-house mechanism shall:

(a) Serve as a centralized platform to enable Parties **and the public** to access, provide, disseminate **and comment on** information with respect to activities taking place pursuant to the provisions of this Agreement



supporting climate regulation (Hilmi et al., 2021; Levin, 2021). In other words, decisions on BBNJ affect everyone's basic human rights, as well as the human right to a healthy environment (UNGA Res 76/300, 2022). Therefore, States need to ensure that, when authorizing an activity that may affect biodiversity, no unjustified, foreseeable infringements of human rights would arise from the decision (Knox, 2017).

The recognition of substantive human rights implications of decisions on BBNJ has, from an international human rights perspective, also procedural dimensions, based on generally applicable international human rights standards:

- ensuring affordable, effective, objective, understandable and timely access to information that should enable people to understand how environmental harm may undermine their rights to life and health and support the exercise of participation rights;
- facilitating participation in decision-making, that should be



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open to all members of the public who may be affected, should give adequate opportunity for the public to express views, and should occur early in decision-making process;

- taking public views into account, which entails an obligation to explain the justification for decisions to the public;
- taking additional steps to facilitate

participation of marginalised communities, women and children (Knox, 2018a and 2018b)

### Recognising Indigenous and local knowledge

The latest draft of the BBNJ Agreement makes provisions for the 'use of the best available science and scientific information, as well as relevant traditional knowledge of indigenous peoples and local communities' as one of its guiding principles. In accordance with international human rights law, however, this should not be seen in isolation from the genuine participation of these knowledge holders in the implementation of the future agreement. The UN Decade of Ocean Science for Sustainable Development (2021-2030) also emphasises the importance of highlighting knowledge-to-policy to better co-design sustainability strategies and incorporating the need and interests of Indigenous peoples and local communities (UNESCO, 2020). Area-based ocean management strategies are continuously criticised for their limited recognition of socio-cultural aspects and priorities (Williams et al., 2020; Stephenson et al., 2021), eventually leading to limited success and reach (Saunders et al., 2020; Vierros et al.,



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2020), providing an opportunity for the BBNJ negotiators to learn from these experiences.

Mulalap et al. (2020) specifically outline two aspects of traditional knowledge in the Pacific region that are highly relevant for the BBNJ Agreement; i) recognising the connectivity of social-ecological systems and species; and ii) best practice for environmental management through ecosystem-based and co-existence approaches that recognises interdependence. In addition to provisions that prevent the exploitation and appropriation of this knowledge (see Article 10bis), specific modalities for the participation of Indigenous and local knowledge holders must be included.

This is also necessary for broader recognition of their cultural rights and of deep-sea cultural ecosystem services. For instance, empirical research conducted under the One Ocean Hub in South Africa (as captured in the animation *Indlela Yokuphilaphila*: see [here](#)) points to the existence of cultural and spiritual connections to the deep-seabed, including overlapping with western



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science on the ocean's role in the water cycle. Decisions on BBNJ, therefore, should prevent impacts that may reduce the availability, accessibility or acceptability of marine spaces and marine resources that are essential for cultural activities, including Indigenous peoples' cultural activities on which their identity, well-being and development depend on.

Procedural obligations for States in this connection to ensure that Indigenous peoples participate in decision-making in matters that would affect their rights, through representatives chosen by themselves

and appropriate procedures in good faith, exist for States that are members of ILO Convention No. 169 on Indigenous and Tribal Peoples, which is admittedly a small number, but also to States members of the global Convention on the Elimination of Racial Discrimination, the Inter-American Convention on Human Rights and the African Convention on Human and Peoples' Rights that have been interpreted in the light of the UN Declaration on the Rights of Indigenous Peoples. It also complements State parties' obligations under the Convention for the Safeguarding of the Intangible Cultural Heritage. [The UN Declaration on the Rights of Peasants and other and Other People Working in Rural Areas](#) is also relevant for the human rights of small-scale fishers and other local communities that may be negatively impacted by biodiversity loss in ABNJ.

### Including children and young people

The impact of ocean pollution, marine biodiversity loss and ocean degradation in general are major threats to the protection and enjoyment of children's human rights (Sweeney and Morgera, 2021). Children are the most vulnerable to environmental harm because they are developing physically and are less resistant to many types of

## TEXTUAL SUGGESTIONS:

### Article 11 bis Access and benefit-sharing mechanism

2. The access and benefit-sharing mechanism shall be composed of members elected by the Conference of the Parties from among the candidates nominated by the Parties and shall include members from developing States, **as well as representatives of indigenous peoples and local communities**. However, if necessary, the Conference of the Parties may decide to increase the size of the mechanism, having due regard to economy and efficiency. In the election of members of the mechanism, due account shall be taken of the need for equitable geographical representation.

3. Members of the mechanism shall have appropriate qualifications in the area of competence of that mechanism. Parties shall nominate candidates of the highest standards of competence and integrity with qualifications in relevant fields, **including Indigenous and local knowledge**, so as to ensure the effective exercise of the functions of the mechanism.





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environmental harm (Knox, 2018b). Because the oceans provide more than half of the oxygen that we breathe and absorb more than a quarter of greenhouse gas emissions from the atmosphere, children's human rights to life, health and development will be affected by long-term environmental changes (UNICEF, 2021), including in BBNJ and the marine ecosystems' contributions to climate regulation.

These facts have led the [UN Committee on the Rights of the Child](#) to start developing a new general comment on children's human right to a healthy environment, with a special focus on climate change, to clarify relevant State obligations under the UN Convention on the Rights of the Child. Even before the finalization of the new general comment, the former UN Special Rapporteur on Human Rights and the Environment John Knox had clarified states' obligations vis-à-vis children's human rights in terms of inter-generational equity: given that the "discussions of future generations [must] take into account the rights of the children who are constantly arriving, or have already arrived, on this planet" (Knox, 2018b). The leaders of UN bodies and organizations issued in June 2021 a [joint commitment](#) on ensuring the promotion and recognition of the right of children, youth and future generations to a healthy environment and their meaningful participation

in decision-making at all levels, in relation to climate action and climate justice.

Acknowledging the relevance of children's rights in BBNJ decisions, in the light of the inter-dependence of their human rights from a healthy environment and a healthy ocean, as well as in support of their meaningful participation in decision-making on biodiversity and climate change, would therefore be a requirement for the States party to the [Convention on the Rights of the Child](#), which requires that "in all actions concerning children, ...the best interests of the child must be a primary consideration" (Art 3(1)).

With particular regard to children's rights, there is a need for specific

modalities to consider children's views on 'long-term environmental challenges that will shape the world in which they will spend their lives' (Knox, 2018b). This implies a series of inter-connected procedural obligations to:

- collect and make publicly accessible information about the environment (including climate change, biodiversity, pollution) and how it may harm children;
- ensure the effects of proposed measures on children's rights, specifically those children most at risk, are assessed before the measures are taken or approved;
- integrate the rights of children in international discussions on future generations in relation to climate change, biodiversity and other environmental issues; and
- take additional steps to facilitate the participation of and children in relevant decisions.

### Building capacity to support participation

Specific capacity-building programmes need to support informed and genuine participation

## TEXTUAL SUGGESTIONS:

### Article 48 bis - Transparency

4. The rules of procedure shall also provide for such representatives to have timely, **affordable and effective** access to all relevant information, **including children-friendly information**.

### Article 51 - Clearing-House mechanism

3. The clearing-house mechanism shall:

(e) Foster enhanced transparency, including by facilitating the sharing of baseline data and information relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction between Parties, **relevant human rights holders including children**, and other relevant stakeholders;

in the implementation of the BBNJ Agreement, including on the legal and institutional processes and evolving marine science. In addition, capacity should be seen as a two-way process of knowledge sharing and co-production, as relevant human rights holders can provide insights to support the realization of the objectives of the BBNJ Agreement.

There should be increased access to both the process and outputs of deep-sea and open ocean research and on mutual learning (see our second BBNJ policy brief), including increased understanding of the interconnectivity between traditional knowledge, ecosystem health, socio-cultural connections with the ocean and livelihoods (Vierros and Harden-Davies, 2020). These, in turn, provide essential knowledge to understand the benefits and risks for the human rights of the global population, as well as of Indigenous peoples and local knowledge holders, and of children, that are dependent on a healthy ocean and healthy marine ecosystems (Morgera, 2022).



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## TEXTUAL SUGGESTION:

### Article 42 Objectives (Capacity Building and Technology Transfer)

The objectives of this Part are to:

b) Enable inclusive, **equitable and effective** participation in the activities undertaken under this Agreement, **and public understanding of their benefits and risks.**

### Article 43 Cooperation in capacity-building and transfer of marine technology

2. In providing capacity-building and the transfer of marine technology under this Agreement, Parties shall cooperate at all levels and in all forms, including through **fair partnerships with civil society and holders of traditional knowledge and involving, where appropriate,** the private sector, as well as through strengthening cooperation and coordination between relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

## Conclusions

The BBNJ negotiations present an opportunity to spell out in more detail the duty to cooperate in the protection of the marine environment in a mutually supportive manner with international human rights law. Such policy coherence can enhance the chances of a new international treaty to contribute synergistically to the realization of several Sustainable Development Goals. Ocean knowledge co-production, not only between States in the Global North and the Global South, but also in partnerships with representatives of civil society, including for Indigenous peoples, local communities and children, can provide a pathway towards transformative ocean governance (Morgera, 2022) to the benefit of global society and future generations.

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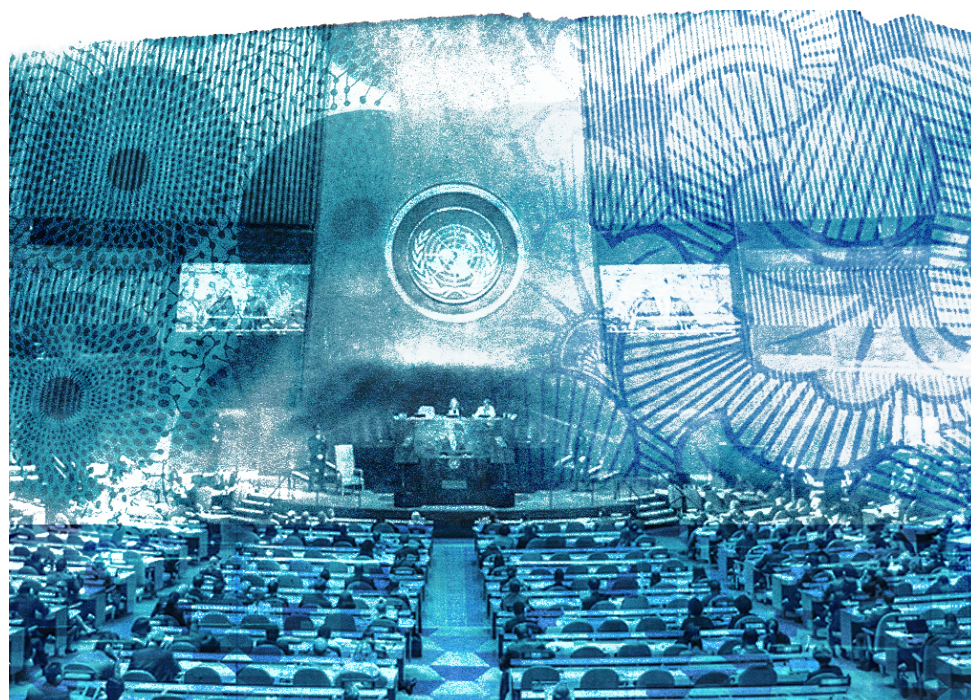


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