



MINISTRY OF FOREIGN & DIASPORA AFFAIRS

PARLIAMENTARY MEMORANDUM

ON


THE RATIFICATION OF THE

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

 THE NATIONAL ASSEMBLY PAPER'S LAID	
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BEYOND NATIONAL JURISDICTION.

1.0 OBJECTIVE OF THE MEMORANDUM

- 1.1 The purpose of this Parliamentary Memorandum is to appraise the National Assembly and seek approval for Kenya's ratification of the *Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity on Areas Beyond National Jurisdiction* (hereinafter referred to as the BBNJ Agreement).
- 1.2 The ratification process was approved by the Cabinet in a meeting held on 18th September, 2024.

2.0 BACKGROUND

- 2.1 The BBNJ Agreement aims to protect the ocean, promote equity and fairness, tackle environmental degradation, fight climate change, and prevent biodiversity loss in the high seas.
- 2.2 The adoption of this Agreement is a historic achievement marking the successful end of more than a decade of multilateral work.
- 2.3 This Agreement is also a welcome addition to the United Nations Convention on the Law of the Sea (UNCLOS), which provides the legal

framework under which all activities in the ocean take place and becomes the third implementing agreement to the UNCLOS.

2.4 The BBNJ Agreement was concluded in June 2023 after almost two decades of negotiations. In 2004, the UN General Assembly (UNGA) constituted an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. Further, in 2017 the United Nations General Assembly convened an Intergovernmental Conference to elaborate the text of an internationally legally binding instrument under the United Nations Convention on the Law of the Sea (“UNCLOS”) on biodiversity conservation and sustainable use.

2.5 Under the overall objective of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction for the present and in the long-term, and further international cooperation and coordination, the BBNJ Agreement addresses four main issues:

- (i) Marine genetic resources, including the fair and equitable sharing of benefits;
- (ii) Measures such as area-based management tools, including marine protected areas;
- (iii) Environmental Impact Assessments; and
- (iv) Capacity-building and the transfer of marine technology.

3.0 OBJECTS AND SUBJECT MATTER OF THE BBNJ

- 3.1 The BBNJ Agreement pertains to the conservation of marine biological diversity in areas beyond national jurisdiction and establishes a mechanism for marine-protected areas beyond national jurisdictions. It is a step towards protecting 30% of the ocean by 2030, as agreed under the Kunming-Montreal Global Biodiversity Framework in December 2022.
- 3.2 The provisions of the BBNJ Agreement do not prejudice the rights and obligations of States under UNCLOS. Likewise, the BBNJ Agreement is to be “applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies”. Examples of such relevant legal instruments are regional seas conventions that include areas beyond national jurisdiction under their geographical coverages, such as the *Convention for the Protection of the Marine Environment of the North-East Atlantic (the Oskar Convention)*.
- 3.3 The BBNJ Agreement is divided into the Four (4) main elements of a package agreed in 2011 on, that is: - **Marine Genetic Resources (MGRs)**, including questions on benefit-sharing; **Environmental Impact Assessments (EIAs)**; **Area-Based Management Tools (ABMTs)**, including **Marine Protected Areas (MPAs)**; and **Capacity Building and Marine Technology Transfer (CB&TT)**.

- 3.4 **Marine Genetic Resources (MGRs)**-The BBNJ Agreement aims to put controls on the exploitation of MGRs. It states that activities relating to MGRs *“are in the interest of all States and for the benefit of all humanity.”* Accordingly, under the BBNJ Agreement, benefits arising from activities involving MGRs and their associated “digital sequence information” (for example, DNA data) which could be significant **must be shared fairly and equitably among States**. This includes not only the sharing of scientific data but also the sharing of financial gains through a financial mechanism established under the Agreement.
- 3.5 The BBNJ Agreement also imposes robust notification requirements before the collection, use, and commercialization of MGRs. For example, States must adopt measures to ensure that detailed information about a planned activity involving MGRs is provided to a “Clearing-House Mechanism” (a centralized platform containing information managed by the UN Secretariat) at least six months before collection.
- 3.6 **Environmental Impact Assessments**- The most significant provisions of the BBNJ Agreement in the climate change discussions are the thirteen provisions on Environmental Impact Assessments (EIAs), which expands significantly on the single provision on EIAs under the Convention. These provisions require pre-authorization assessments of the potential impacts on the high seas or deep seabed of activities planned in those areas, which could include the exploitation of marine genetic resources, laying of submarine cables, and oil and gas exploration.

- 3.7 Under the BBNJ Agreement, States must ensure that EIAs are performed for planned activities within their “jurisdiction or control.” While the term “jurisdiction or control” is not defined in the BBNJ Agreement, it was the understanding of the delegations that it includes activities within a State’s “jurisdiction or control” as covering activities such as those taking place in a State’s national territory as well as those activities beyond national jurisdiction by ships flying their flags.
- 3.8 EIAs therefore will be needed for planned activities taking place in the high seas or deep seabed, as well as for those activities taking place within a country’s national jurisdiction that “may cause substantial pollution of” or “significant and harmful changes to the marine environment” in the high seas or the deep seabed.
- 3.9 The BBNJ Agreement details a four-stage process for conducting EIAs: (1) screening, (2) scoping, (3) impact assessment and evaluation, and (4) prevention, mitigation, and management of potential adverse effects.
- 3.10 The BBNJ Agreement requires the preparation of a detailed EIA report, which must be made publicly available and which States must consider when deciding whether to authorize a planned activity.
- 3.11 It further imposes a continuous obligation on States to monitor and periodically report on the environmental and associated effects of an authorized activity. Importantly, there is a carve-out providing that EIAs need not always be conducted under the BBNJ Agreement’s procedure.

They may in certain circumstances be conducted in accordance with national laws or other applicable international instruments.

- 3.12 **Area-based Management Tools** - Closely linked to the increasing need to conserve and protect the oceans, are the elements of the BBNJ Agreement which gives States the means to establish “area-based management tools (ABMTs)” in the high seas and deep seabed. These are measures to manage human activities in areas specifically delimited for conservation purposes. They prominently include “marine protected areas (MPAs),” wherein some types of human activities, such as mining and shipping, are restricted.
- 3.13 Prior to the BBNJ Agreement, there was no global mechanism to establish marine protected areas and other area-based management tools. Regulation of this variety was limited to single sectors (like fishing) and covered small areas of the ocean.
- 3.14 Under the new framework in the BBNJ Agreement, States will be empowered to implement larger-scale, legally binding, and multi-sectoral area-based management tools.
- 3.15 During negotiations, States carefully considered the potential impacts of such tools on existing uses of ocean areas and resources such as, for example, the laying of submarine cables that crisscross the ocean floors and enable internet connectivity. The BBNJ Agreement therefore requires States to collaborate and consult with “relevant stakeholders,”

including the “scientific community,” “Indigenous Peoples and local communities,” and the “private sector,” when formulating and assessing plans for area-based management tools.

3.16 Notably, area-based management tools established under the BBNJ Agreement will have to respect the existing measures of other international bodies. These include regulations of fishing, shipping, and deep-sea mining by regional fishery management organizations, the International Maritime Organization, and the International Seabed Authority.

3.17 **Capacity-building, Transfer of Marine Technology, and Financial Assistance-** The BBNJ Agreement includes a dedicated section on capacity-building and the transfer of marine technology. Marine technology includes the equipment and expertise relevant to the conservation and sustainable use of marine biodiversity, including marine scientific research.

3.18 Notably, the BBNJ Agreement has provisions requiring States to cooperate to assist each other in achieving the BBNJ Agreement’s objectives through capacity-building and the transfer of marine technology, including through partnerships with the private sector.

3.19 In addition, the BBNJ Agreement establishes a special fund providing financial assistance to developing States in implementing the treaty. The fund will be financed through annual contributions of States and

financial gains made from the exploitation of marine genetic resources. Private entities may also make voluntary contributions to the fund. This provision was of great importance, particularly to developing States as it ensures the equitable sharing of resources.

3.20 **Dispute Settlement and Advisory Opinions**

3.21 The BBNJ Agreement's dispute-settlement provisions largely draw on those of other law of the sea treaties. They provide that disputes of a "technical nature" will be referred to an ad hoc expert panel established by the parties to the dispute, as in Article 29 of the UN Fish Stocks Agreement.

3.22 Specifically, disputes concerning the interpretation or application of the Agreement will employ the already existing provisions of the Convention which States the choice to refer their disputes to either: (1) the International Tribunal for the Law of the Sea; (2) the International Court of Justice; (3) an arbitral tribunal established under Annex VII of the Convention; or (4) a special tribunal established under Annex VIII of the Convention.

3.23 A novel feature of the BBNJ Agreement is that it authorizes the Conference of the Parties (the BBNJ Agreement's governing body composed of all parties) to request an advisory opinion from the International Tribunal for the Law of the Sea "on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence."

Delegations carefully circumscribed the scope of this provision to address fears that advisory opinions would be misused to address contentious matters outside the scope of the BBNJ Agreement.

4.0 OBLIGATIONS IMPOSED BY THE BBNJ

4.1 The Agreement imposes the following obligations to Member States:-

- i. States must share the non-monetary and monetary benefits from the utilization of marine genetic resources and digital sequence information;
- ii. ‘Developed States’ must make annual contributions to a ‘special fund’ established to fund capacity-building projects and to assist developing State Parties in implementing the BBNJ Agreement. The Agreement also establishes a Global Environment Facility Trust Fund for the same purpose;
- iii. States “shall” submit proposals regarding the establishment of area-based management tools, including marine protected areas, which shall include certain prescribed elements. These proposals will be reviewed by a newly established Scientific and Technical body and are subject to a stakeholder consultation process. Based on the resulting final proposal, the Conference of the Parties to the BBNJ Agreement shall decide on the “establishment of area-based

management tools, including marine protected areas, and related measures”;

- iv. States must ensure that an Environmental Impact Assessment is conducted of planned activities in their jurisdiction or control that “may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction”; and
- v. States must take measures to ensure that certain information in relation to the collection *in situ* of marine genetic resources of areas beyond national jurisdiction is notified to a newly established clearing-house mechanism. This Clearing House Mechanism is a centralized open-access platform, for such information-sharing purposes and to match capacity-building needs with available support.

5.0 PROBLEM ANALYSIS

- 5.1 The Amended Convention notes in the preamble that the existing international conventions concerning the Marine and Coastal Environment does not cover all aspects and sources of marine pollution and Environmental degradation and do not entirely meet the special requirements of the Western Indian Ocean.
- 5.2 The Amended text was adopted so as to incorporate the transboundary issues of climate changes, marine and land based

pollution, integrated coastal management and the importance of biological diversity.

5.3 This resulted to the addition of two new articles to the Convention:

- Article 9, Pollution resulting from Transboundary Movement of Hazardous Wastes to prevent and abate pollution that might be caused by transboundary movement and disposal of hazardous waste and if possible eliminate such waste and;
- Article 11, Biological Diversity to preserve rare or fragile ecosystems, endangered or threatened species of Fauna and Flora and their habitats.

5.4 The rationale to this is that the utilization of transboundary resources causes impacts such as pollution, overfishing, and the destruction of habitat.

6.0 JUSTIFICATION

6.1 The BBNJ Agreement is key to the protection of the oceans, promotion of equity and fairness, tackling environmental degradation, fighting climate change, and preventing biodiversity loss in the high seas.

6.2 The BBNJ Agreement, if properly harnessed presents the following opportunities for coastal countries, including Kenya, as follows: -

- i. **Opportunities to meet Sustainable Development Goals (SDGs):** the BBNJ Agreement opens up opportunities to fight hunger and poverty and foster socio-economic development through access to ocean resources;
- ii. **Reduction of financial constraints:** The Agreement recognizes that the resources of the ocean beyond national jurisdiction are the common heritage of mankind. In furtherance of this principle, the Agreement will reduce the financial constraints on African States as there is an obligation to fairly and equitably share monetary and non-monetary benefits, and for developed countries to make upfront payments to finance capacity building for implementing the Agreement upon entry into force;
- iii. **Promotion of scientific knowledge-** the BBNJ Agreement provisions extend to MGRs and Digital Sequence Information (DSI) collected or generated before its entry into force, except if a State declares otherwise. Nevertheless, the Agreement allows African scientists access to old samples from marine scientific research and samples collected under the BBNJ. For a young African scientist, the BBNJ Agreement means an opportunity to get involved in research projects, and access samples, databases, repositories, and digital sequence information;
- iv. **Biodiversity conservation:** Adoption of conservation and management measures will protect, preserve, restore, and

- maintain biodiversity and ecosystems that will support Africa's food security and other socioeconomic objectives;
- v. **Regulation of Illegal Unreported and Unregulated (IUU) fishing:** Kenya has continuously reported on the rampant IUU fishing. It is to be noted that fishing companies in developed states overfish in the high seas areas adjacent to Exclusive Economic Zones of coastal African States. The BBNJ Agreement's focus on marine ecological connectivity and other measures will limit such unsustainable and unregulated illegal fishing. The requirement to make available DNA-RNA material of the marine genetic resource through an open-access system will ensure that scientific information is available for comparison;
 - vi. **Capacity building for EIAs:** The Agreement calls for assistance to developing countries to strengthen their capacity to prepare, conduct, and evaluate Environmental Impact Assessments (EIAs). It will ensure that activities on the high seas are assessed to prevent, mitigate, and manage adverse environmental impacts and protect and preserve the marine environment. Significantly for African States, the Agreement addresses critical issues of transboundary harm and cumulative impacts;
 - vii. **International opportunities for Kenyans:** The BBNJ has established six (6) Institutional Frameworks responsible for the implementation of the Agreement namely; the Access

and Benefit-Sharing Committee, Scientific and Technical Body, Clearing House Mechanism, Conference of Parties, Implementation and Compliance Committee and Secretariat. Save for the Conference of Parties, these bodies serve as opportunities through which Kenya can nominate persons to ensure that Kenya's interests can be advanced at the onset;

viii. **Positioning Kenya as a regional hub for BBNJ and Blue Economy matters:** The BBNJ Agreement has given some prominence to regional organizations to handle matters such as area-based management tools, marine protected areas as well as the use of EIA processes developed by such organizations. This provides an excellent opportunity for Kenya to serve as the regional hub for African countries on BBNJ and Blue Economy matters. This will unlock not only employment opportunities but will see funding for the development of marine-related technology; and

ix. **Boosting Kenya's International Reputation:** Signing and ratification of the Agreement will enhance Kenya's international reputation by demonstrating a commitment to environmental matters and ocean management.

7.0 COMMON CONSTITUTIONAL AND LEGISLATIVE IMPLICATION

7.1 The BBNJ Agreement does not propose any amendments to the Constitution and is consistent with constitutional provisions, in particular Part 2 and Article 69 (1) (a), (e), (f), (g), and (h) of the

Constitution which provide for the State obligations in respect of the environment.

- 7.2 Upon signature, Kenya will be required to ratify the BBNJ Agreement in line with Article 71(1) of the Constitution and the Treaty Making and Ratification Act and will require the review of existing legislation relating to environmental protection, oceans management and biodiversity management for full implementation of the BBNJ Agreement.

8.0 IMPLICATION RELATING TO COUNTIES

- 8.1 The obligations under the BBNJ Agreement are functions of the National Government under the Constitution but will require collaboration between the National and County governments in line with the distribution of functions under the Fourth Schedule of the Constitution of Kenya.

9.0 FINANCIAL IMPLICATION

- 9.1 Under ratification of the Agreement will not occasion additional expenditure on the exchequer save for that which would be incurred while implementing the Agreement. This includes the development and harmonization of relevant policies and laws.
- 9.2 These funds will be requested through the sector process during the budget preparation cycle/process by Multi-Agency involved in matters relating to environmental conservation, and blue economy and maritime affairs.

10.0 MINISTERIAL RESPONSIBILITY

10.1 Implementation of the BBNJ Agreement will be under the collective responsibility of Government Ministries, Departments and Agencies who will be consulted to give direction and advice such as the Ministry of Mining, Blue Economy & Maritime Affairs, the Ministry of Environment, Climate Change & Forestry, the National Treasury and Economic Planning, the Office of the Attorney General and Department of Justice, among others.

10.2 The Office of the Attorney General and Department of Justice and the Ministry of Foreign and Diaspora Affairs will coordinate the reporting process on State obligations pursuant to the Treaty Making and Ratification Act CAP 4D of the Laws of Kenya.

11.0 RESERVATION

11.1 The BBNJ Agreement does not allow States to make any reservations other than those reservations expressly provided for in the Agreement.

12.0 RECOMMENDATION

12.1 In consideration of the aforementioned facts, the National Assembly is invited to:

- i. Note the contents of the Memorandum;
- ii. Consider and approve the BBNJ;
- iii. Direct the Prime Cabinet Secretary and Cabinet Secretary for Foreign Affairs & Diaspora Affairs to

prepare and deposit the relevant instruments to the
Depositary.

SIGNED.......... DATED..........

H.E DR. MUSALIA MUDAVADI, EGH
PRIME CABINET SECRETARY & CABINET SECRETARY FOR FOREIGN &
DIASPORA AFFAIRS