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From Consultation to Compliance: Evidentiary Continuity and Global South Implementation under the BBNJ Agreement

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Abstract

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 (BBNJ Agreement) distributes implementation questions across institutions that apply different legal tests. This article examines a problem with particular significance for Global South administrations: whether facts produced during consultation, capacity-building or finance must be reconstructed when later bodies consider compliance or objection. It argues for factual continuity with independent legal recharacterisation. Reliable facts should travel, while beneficiary class, threshold, comparator and consequence must be applied afresh. A functional comparison with the United Nations Fish Stocks Agreement shows why the BBNJ Agreement's fragmented architecture makes evidentiary translation unusually important. Official materials from Viet Nam, Indonesia and the Philippines are analysed as three interfaces between international institutions and domestic legal orders: legislative adaptation, allocation of coordination authority and Clearing-House Mechanism design. They are not treated as proxies for incapacity or proof of realised burdens. The article proposes a short, dated and contestable common factual record embedded in existing treaty procedures, reducing repetitive evidentiary production without creating precedent or a new reporting layer.

Keywords: BBNJ Agreement; Global South; evidentiary continuity; treaty implementation; institutional fragmentation; capacity-building

1. Introduction

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 (BBNJ Agreement) entered into force on 17 January 2026.[1] Entry into force changes the character of several questions that could previously be treated as negotiating design. Parties must now build national channels for communication and implementation, while the treaty system is still operationalising the institutional arrangements through which proposals, support, information and compliance will move. The United Nations has already invited Parties to designate focal points to send and receive formal communications and to

[1] 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 (adopted 19 June 2023, entered into force 17 January 2026) C.N.203.2023.TREATIES-XXI.10; Depositary Notification C.N.447.2025.TREATIES-XXI.10 (BBNJ Agreement).

disseminate implementation information at national level.[2] That administrative fact matters because BBNJ implementation will not occur in a single forum or through a single public authority.

Consider a constraint first identified while a Party responds to a proposal for an area-based management tool (ABMT). The responsible ministry may lack legal authority to coordinate sectoral input; a dataset may be inaccessible within the consultation period; or a proposed monitoring task may depend on technical capability not yet available to the implementing agency. The same underlying facts may later appear in a needs assessment under Part V, a request for finance under Article 52, a facilitative compliance process under Article 55, or an objection under Article 23(5)(c). Each institution may need the factual history. None is entitled simply to inherit the earlier legal conclusion.

That distinction is easy to state but difficult to administer. Article 25(3) provides that implementation of Part III measures should not impose a disproportionate burden, directly or indirectly, on Parties that are small island developing States (SIDS) or least developed countries (LDCs).[3] Articles 41-42 recognise the wider capacity needs of developing States and require support to respond to needs and priorities; Article 52 allocates financial resources according to need and equitable sharing criteria; Article 55 establishes a transparent, non-adversarial and non-punitive implementation and compliance mechanism; and Article 23(5)(c) permits an objection where a Party cannot practicably comply with a specific Part III decision at the time of objection after making all reasonable efforts to do so.[4] These provisions are connected by implementation facts, but they differ in beneficiary, trigger, institutional setting and consequence.

Existing scholarship explains the treaty architecture in considerable depth. The Oxford Commentary treats ABMT decision-making, capacity-building and technology transfer, and the institutional and financial architecture as distinct parts of the Agreement.[5] Implementation

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[2] United Nations, 'Notification 2026-001: Focal points for formal communications under the BBNJ Agreement' (United Nations). https://www.un.org/bbnjagreement/en/notification-2026-001. Accessed 02 September 2026.
[3] BBNJ Agreement (n 1) art 25(3).
[4] BBNJ Agreement (n 1) arts 41(3), 42, 52(3), 52(6), 52(11)-(12), 55(1)-(4) and 23(5)(c).
[5] Nichola A Clark, Kristina M Gjerde and Mariamalia Rodríguez Chaves, 'Part III: Area-Based Management Tools, Including Marine Protected Areas' in Joanna Mossop and David Freestone (eds), The Agreement on Marine Biodiversity of Areas Beyond National Jurisdiction: Commentary and Analysis (Oxford University Press 2025) 152-214 <https://doi.org/10.1093/law/9780198918578.003.0006>; Harriet Harden-Davies and Júlia Schütz Veiga, 'Part V: Capacity-Building and the Transfer of Marine Technology' in Joanna Mossop and David Freestone (eds), The Agreement on Marine Biodiversity of Areas Beyond National Jurisdiction: Commentary and Analysis (Oxford University Press 2025) 291-326 <https://doi.org/10.1093/law/9780198918578.003.0008>; Kentaro Nishimoto and Le Duy Tran, 'Part VI: Institutional Arrangements and Part VII: Financial Resources and Mechanism' in Joanna Mossop and David Freestone (eds), The Agreement on Marine Biodiversity of Areas Beyond National Jurisdiction: Commentary and Analysis (Oxford University Press 2025) 327-355 <https://doi.org/10.1093/law/9780198918578.003.0009>.

scholarship has separately examined durable capacity-building, needs-based resource mobilisation, scientific gaps, the design of the Scientific and Technical Body (STB), and the Clearing-House Mechanism (CHM).[6] Work on ABMTs has also clarified COP competence, the ‘not undermining’ rule and interaction with sectoral institutions.[7] The unresolved problem is narrower: how should a factual account produced in one BBNJ process be used when a different body later applies a different legal test?

Viewed from a Global South perspective, the problem is not exhausted by the familiar language of 'capacity deficits'. Global South scholarship has long cautioned that formally universal international legal regimes can distribute institutional demands unevenly and can reshape the relationship between international institutions and domestic legal orders. The argument here is narrower than a general Third World Approaches to International Law critique. 'Global South' is not used as a treaty beneficiary category, a proxy for incapacity or a presumption of legal disadvantage. It identifies a recurrent administrative asymmetry: formally equal access to consultation, finance, information and compliance can coexist with materially different costs of producing, translating and reproducing the evidence required to use those procedures. BBNJ makes that asymmetry visible because support, finance, compliance and objection are legally distinct but factually connected.[8]

This article answers that question through a principle of factual continuity with independent legal recharacterisation. Historical facts - the measure or procedure, the task it

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[6] Harriet Harden-Davies and others, 'First to Finish, What Comes Next? Putting Capacity Building and the Transfer of Marine Technology under the BBNJ Agreement into Practice' (2024) 3 npj Ocean Sustainability art 3 <https://doi.org/10.1038/s44183-023-00039-1>; Liz Hollaway and others, 'Grounding the BBNJ Agreement's Resource Mobilization Goal: Cost Benchmarks and the Case for Needs-Based Funding' (2026) 13 Frontiers in Marine Science 1773862 <https://doi.org/10.3389/fmars.2026.1773862>; Claire L Szostek and others, 'Science Challenges and Solutions to Support Implementation of the Biodiversity Beyond National Jurisdiction Agreement' (2026) 5 npj Ocean Sustainability art 22 <https://doi.org/10.1038/s44183-026-00191-4>; Martin Hitziger and Lisa Speer, 'Salience, Legitimacy and Credibility of the Scientific and Technical Body to the BBNJ Agreement: Precedents, Best Practices and Trade-offs' (2026) 4 Frontiers in Ocean Sustainability 1837491 <https://doi.org/10.3389/focsu.2026.1837491>; Christine Gaebel and others, 'The BBNJ Clearing-House Mechanism: Considerations for Its Diverse Functions, Users, and Sources' (2025) 3 Frontiers in Ocean Sustainability 1584927 <https://doi.org/10.3389/focsu.2025.1584927>.

[7] Vito De Lucia, 'After the Dust Settles: Selected Considerations about the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction with Respect to ABMTs and MPAs' (2024) 55 Ocean Development & International Law 115, 132-135 <https://doi.org/10.1080/00908320.2024.2333893>; Bastiaan E Klerk, 'A Sheep in Wolf's Clothing? Reflections on the Institutional Nature of the New Regime for ABMTs and MPAs under the BBNJ Agreement' (2025) 56 Ocean Development & International Law 1 <https://doi.org/10.1080/00908320.2024.2435291>; Aldo Chircop, 'The BBNJ Agreement and IMO: What Role for Maritime Law Instruments and Measures?' (Ocean Development & International Law, published online 01 March 2026) <https://doi.org/10.1080/00908320.2026.2627550>; Vito De Lucia, 'Mapping Opportunities: The BBNJ Agreement as a Cooperation and Coordination Framework for the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction' (2025) 36(1) Yearbook of International Environmental Law yvag001 <https://doi.org/10.1093/yiel/yvag001>; Bastiaan Ewoud Klerk, 'Beyond Undermining: COP Competences to Establish ABMTs and MPAs under the BBNJ Agreement' (Ocean Development & International Law, published online 04 March 2026) <https://doi.org/10.1080/00908320.2026.2631511>.

[8] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3; Sundhya Pahuja, Decolonising International Law: Development, Economic Growth and the Politics of Universality (Cambridge University Press 2011) <https://doi.org/10.1017/CBO9781139048200>.

generates, the institution expected to perform it, the timetable, the impediment identified, assistance sought or offered, and subsequent changes - should not have to be reconstructed from zero each time the institutional forum changes. By contrast, a finding that those facts establish a ‘need’ under Part V cannot establish disproportion under Article 25(3); neither finding proves that compliance is not practicable under Article 23(5)(c). In short, the factual record may travel; the legal characterisation must be made again.

The claim is deliberately limited. It does not create a freestanding defence of vulnerability, expand Article 25(3) beyond SIDS and LDC Parties, lower Article 23(5)(c), or make finance an entitlement whenever implementation is costly. Nor does it impose a claimant-style burden of proof on developing States. Evidence is itself costly to produce. A system that repeatedly demands the same documentary history from the actor facing the constraint can reproduce the inequality that the support architecture is intended to reduce. The institutional question is therefore also one of evidentiary labour: who is best placed to identify the regulatory task, the responsible institution, the alternatives considered and the support actually available?

The timing of this argument is important. The Agreement has entered into force, the third substantive session of the Preparatory Commission concluded on 02 April 2026, and current United Nations materials show that modalities for subsidiary bodies, the CHM, finance and cooperation with relevant instruments and bodies remain central implementation questions. Yet no mature body of Part III COP measures exists from which realised national burdens can be measured. That is not a reason to simulate empirical certainty. It is a reason to distinguish an institutional design argument from a post hoc causal study. The present implementation window is precisely when the treaty can decide whether its procedures will preserve reliable factual histories or force Parties and treaty bodies to rediscover them repeatedly.[9]

The Southeast Asian cases provide concrete sites at which this broader Global South implementation problem can be observed without treating the region as legally homogeneous. The United Nations convened a regional BBNJ workshop for North-East and South-East Asian States in Bangkok in September 2024; Asia-Pacific seats on the Preparatory Commission Bureau have included Singapore, the Philippines, Indonesia and Viet Nam; and

[9] United Nations, 'Third session (23 March-02 April 2026)' (United Nations). https://www.un.org/bbnjagreement/en/third-session-23-march-2-april-2026. Accessed 02 September 2026; United Nations, 'PrepCom III written input' (United Nations). https://www.un.org/bbnjagreement/en/prepcom-III-written-input. Accessed 02 September 2026.

a May 2026 Asia-Pacific technical workshop focused specifically on implementation and cooperation. These processes do not create a regional implementation regime. They do, however, place differently organised domestic administrations in recurring contact with the same treaty institutions, capacity-building channels and shared information infrastructure. That combination makes the three cases useful for examining how a common international architecture meets different domestic legal and administrative orders.[10]

The article proceeds in six stages. Section 2 explains the doctrinal method, the functional comparison with the United Nations Fish Stocks Agreement (UNFSA) and the comparative documentary design. Section 3 develops a task-centred attribution protocol. Section 4 shows how the same evidence changes legal significance across Article 25(3), Parts V and VII, Article 55 and Article 23(5)(c). Section 5 uses UNFSA to explain why institutional fragmentation creates a translation problem. Section 6 examines the domestic-international implementation interfaces documented in Viet Nam, Indonesia and the Philippines. Section 7 converts the analysis into a low-burden continuity protocol and identifies the conditions under which the model may travel beyond BBNJ.

2. Method, Comparison and Evidentiary Limits

2.1 Doctrinal method: legal difference before equitable intuition

The doctrinal analysis applies Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) to the ordinary meaning, context, object and purpose of the relevant BBNJ provisions and, where useful, their negotiating history.[11] The method begins from textual differentiation. Article 25(3) names SIDS and LDC Parties. Articles 40-42 use broader categories of developing States and identify special circumstances within them. Article 52 uses need and equitable sharing criteria for financial allocation. Article 55 is facilitative and system-facing. Article 23(5)(c) is available to any Party but only for a specific COP decision and only where practical compliance remains impossible after all reasonable efforts. Those differences are treated as choices that structure legal consequences, not as interchangeable formulations of a single equity principle.

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[10] United Nations, 'Regional Workshops: North-East and South-East Asia' (Bangkok, 16-20 September 2024). https://www.un.org/bbnjagreement/en/capacity-building-and-technical-assistance/regional-workshops. Accessed 03 September 2026; United Nations, 'Officers - Preparatory Commission' (United Nations). https://www.un.org/bbnjagreement/en/meetings/preparatory-commission/officers. Accessed 03 September 2026; United Nations, 'Capacity-Building and the Transfer of Marine Technology: 2026 Asia-Pacific Technical Workshop on BBNJ Implementation and Cooperation' (28-29 May 2026). https://www.un.org/bbnjagreement/en/Information-sharing/CBTMT. Accessed 03 September 2026.

[11] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31-32.

This approach also distinguishes three propositions that are often collapsed. First, a factual condition may exist: an agency lacks authority, a dataset cannot be used, or a monitoring requirement cannot be met on time. Secondly, that condition may be attributable to a BBNJ measure or procedure rather than to background circumstances. Thirdly, attributable facts may or may not satisfy the legal threshold of the provision being invoked. The sequence matters. If legal labels such as 'disproportionate burden', 'need' or 'impracticability' are attached before attribution is established, the analysis risks converting development status into a substitute for causation.

2.2 Functional comparison with UNFSA

UNFSA is used as a functional comparator, not as a source of criteria to be transplanted into BBNJ. Articles 24-26 place dependence on living marine resources, disproportionate conservation burdens, cooperation and assistance within a comparatively integrated set of developing-State provisions.[12] BBNJ distributes analogous implementation concerns across ABMT procedures, capacity-building, finance, information infrastructure, compliance and objection. The comparison therefore tests an institutional proposition: where vulnerability evidence and legal response are located close together, evidentiary translation is less visible; where they are dispersed, the system needs a disciplined rule for reuse without doctrinal carry-over.

2.3 Comparative documentary analysis: implementation interfaces rather than capacity rankings

The documentary component uses official materials publicly available through 02 September 2026. Viet Nam, Indonesia and the Philippines had all become Parties by September 2025. For Article 25(3), all three are treated as outside the SIDS/LDC beneficiary class. They are therefore not presented as cases that 'test' whether Article 25(3) has been violated. Their value is institutional: each records a treaty-relevant implementation fact at a different point where international legal obligations meet a domestic or shared administrative system. The Vietnamese material concerns legislative adaptation; the Indonesian material concerns allocation of executive coordination authority; and the Philippine material records participation in the operationalisation of a common treaty information system.[13][14]

[12] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 04 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (UNFSA), arts 24-26.

[13] United Nations Treaty Collection, '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' (United Nations).

The cases are not presented as representative of Southeast Asia or of the Global South, and they are not ranked by readiness. They are selected to hold geography, treaty timing and developing-State status broadly constant while varying the institutional location of the documented task. This controlled variation tests a proposition central to the article: the same vocabulary of 'capacity' can conceal legally different problems because implementation may fail at the level of legislation, executive authority or common treaty infrastructure. A comparison centred on institutional location is therefore more informative than a country-level capacity score.

This is an intentionally asymmetric evidentiary design. A document can establish that a legal reform is underway, that authority remains unsettled, or that a State made a submission on CHM design. It cannot, without a specific measure and demonstrated pathway, establish a realised BBNJ burden, welfare loss, disproportionality or impracticability. Silence in the public record is equally non-probative. The country sections therefore ask five controlled questions: what treaty-relevant task is documented; where is responsibility located; what constraint or design issue is actually reported; what inference is supported; and what stronger inference remains unsupported?

AOSIS and Pacific SIDS practice are used only to illuminate the category-specific dimension of the treaty. The PrepCom III record confirms sustained submissions by AOSIS, Pacific SIDS and individual SIDS across subsidiary-body, CHM, cooperation and finance questions.[15] That practice shows that category-specific participation is already part of institutional design, but it does not prove that any Part III measure has imposed a disproportionate burden. The Article 25(3) analysis is therefore prospective and doctrinal. Treating that absence of realised cases as a methodological limit is preferable to manufacturing an empirical application the record cannot support.

The research design combines two tests. The factual-continuity test asks which elements of an implementation history remain relevant when information moves between treaty processes. The legal-translation test asks what must be reconsidered because the later provision changes the beneficiary, threshold, comparator or legal consequence. Applied to the three documentary cases, the tests also distinguish the location of responsibility: domestic

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https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en. Accessed 02 September 2026.

[14] United Nations Statistics Division, 'Standard country or area codes for statistical use (M49): Overview' (United Nations). https://unstats.un.org/unsd/methodology/m49/overview/. Accessed 02 September 2026.

[15] United Nations, 'PrepCom III written input' (n 9).

law, domestic coordination or treaty-level infrastructure. Together they permit a practical institutional claim without converting Global South status or regional proximity into a legal inference the evidence cannot support.

During manuscript revision, an OpenAI large language model was used to assist with structural reorganisation, language editing and drafting suggestions. The author retains full responsibility for the legal analysis, verification of authorities and final text.

3. Attributing an Implementation Constraint before Characterising It

3.1 The unit of analysis is a treaty task, not a State

An 'implementation burden' is not synonymous with the ordinary cost of treaty membership. Part III may require a State to assess scientific material, participate in consultation, coordinate a national position, regulate activities under its jurisdiction or control, promote measures in a sectoral body, monitor implementation and report results.[16] Each task consumes resources. Resource use becomes legally salient only when it connects to the operation of a provision such as Article 25(3), a needs assessment, facilitative compliance or Article 23(5)(c). If every administrative expense were treated as a legal burden, the concept would lose its limiting function.

The appropriate unit is therefore the treaty task. A task-centred inquiry asks what must be done, by whom, under what authority, by when, and with what information or technology. Aggregate national indicators cannot answer those questions. A State may have extensive scientific capability while the ministry responsible for a time-limited ABMT consultation lacks access to the relevant expertise. Conversely, a State without a national oceanographic laboratory may still perform the task through regional arrangements or shared scientific services. Capacity is functional and institutional before it is national.

The STB and CHM illustrate the point. The STB's legitimacy will depend partly on how it evaluates evidence, communicates uncertainty and enables participation from differently situated Parties.[17] The CHM must serve diverse users and sources while remaining accessible.[18] Formal availability of information does not establish usable access. An agency may be unable to process a dataset in time, an interface may be incompatible with domestic systems, or translation and metadata requirements may shift administrative effort onto

[16] BBNJ Agreement (n 1) arts 19, 21, 22, 25 and 26.
[17] Martin Hitziger and Lisa Speer, 'Salience, Legitimacy and Credibility of the Scientific and Technical Body to the BBNJ Agreement: Precedents, Best Practices and Trade-offs' (n 6).
[18] Christine Gaebel and others, 'The BBNJ Clearing-House Mechanism: Considerations for Its Diverse Functions, Users, and Sources' (n 6).

particular users. The relevant question is not whether the State is generally 'scientifically capable' or 'digitally ready'. It is whether the institution assigned a particular treaty function can perform it within the applicable procedure.

Finance is similarly task-dependent. Article 52 requires adequate, accessible, new, additional and predictable resources, but the immediate impediment may arise before money can be disbursed: no public body may be authorised to formulate the request; the responsible ministry may not control the relevant data; or project finance may not sustain the personnel needed for an ongoing monitoring function.[19] Resource-mobilisation research confirms both the magnitude of implementation functions and the danger of treating spending in analogous regimes as a proxy for BBNJ need.[20] Money remedies an implementation problem only when it reaches the institution and function where performance is actually blocked.

3.2 Causal pathway, two baselines and operational significance

A defensible attribution begins with a causal chain: the BBNJ measure or procedure; the domestic or sectoral act through which it operates; the treaty task thereby generated; the institution responsible for that task; and the observed impediment. This chain is indispensable when shipping, fisheries or seabed activities are implicated. Article 22 preserves the competence of relevant legal instruments and bodies, while Article 25(4) requires Parties to promote appropriate measures within them.[21] The COP does not become a general regulator of sectors merely because a sector affects biodiversity in areas beyond national jurisdiction.

Indirect burdens under Article 25(3) do not remove the need for causation. 'Indirectly' permits an extended pathway: a COP decision may require a Party to act through an international organisation, which may then adopt or modify a sectoral measure that produces a domestic implementation task. Scholarship on the BBNJ-IMO relationship and the Agreement's coordination architecture demonstrates how authority can be distributed across institutions.[22] The immediate source of a cost may therefore be a sectoral measure, but attribution to BBNJ still requires a reasoned account of how the Part III decision materially generated, shaped or required the intervening act.

Two baselines must then be separated. The causal baseline asks what task, expenditure or adjustment would have arisen without the BBNJ measure or procedure. It screens out pre-

[19] BBNJ Agreement (n 1) art 52(3), 52(6), 52(11)-(12).
[20] Liz Hollaway and others, 'Grounding the BBNJ Agreement's Resource Mobilization Goal' (n 6).
[21] BBNJ Agreement (n 1) arts 5(2), 22 and 25(4).
[22] Aldo Chircop, 'The BBNJ Agreement and IMO' (n 7); Vito De Lucia, 'Mapping Opportunities' (n 7); Bastiaan Ewoud Klerk, 'Beyond Undermining' (n 7).

existing administrative weakness, general ocean-governance expenditure and measures independently required by another regime. The distributive comparator asks a different question: why is the incremental demand excessive for the legally protected beneficiary? Article 25(3) does not prescribe whether disproportion should be judged across Parties, against absorptive capacity, by reference to transition costs and conservation benefits, or through a combination. A decision-maker must therefore state the comparator used rather than allowing the word 'disproportionate' to conceal the evaluative choice.

Operational significance is the next screen. The Agreement does not create a free-standing 'materiality' threshold for implementation burden; the term is used here analytically to exclude trivial claims. The relevant evidence concerns the effect on participation, implementation or adjustment. A small monetary cost may be significant if it requires scarce expertise during a short consultation window. A larger expenditure may be routine where it falls within an existing regulatory system. The analysis should specify the concrete effect: delayed participation, inability to evaluate scientific assumptions, failure to coordinate an implementing measure, loss of access to a reporting system, or a transition demand that cannot be managed within the available period.

Distributional evidence enters after that causal work. Livelihood dependence, food security, concentration of adjustment, realistic substitutes and ecological connectivity can explain why an apparently uniform measure is absorbed differently. They cannot cure a missing causal link. Nor do they point automatically in one direction. The same community may experience concentrated short-term transition costs and substantial long-term ecological benefits. The legal question is not gross cost versus gross benefit in the abstract; it is whether the incidence and timing of the implementation demand disables a protected function or makes adjustment excessive under the provision being applied.

3.3 Location of scarcity and remedial fit

Attribution must finally locate the scarcity. Some implementation gaps are domestic: authority is unclear, agencies cannot share data, or a legal mandate has not been assigned. Others are systemic. Scientific literature identifies substantial global gaps in baseline data, taxonomy, monitoring and ecological knowledge relevant to BBNJ implementation.[23] A

[23] Alex David Rogers, 'A Scientific Perspective on the Biodiversity beyond National Jurisdiction (BBNJ) Agreement' in Joanna Mossop and David Freestone (eds), The Agreement on Marine Biodiversity of Areas Beyond National Jurisdiction: Commentary and Analysis (Oxford University Press 2025) 426-443 <https://doi.org/10.1093/law/9780198918578.003.0013>; Claire L Szostek and others, 'Science Challenges and Solutions' (n 6).

global epistemic deficit should not be redescribed as weak national capacity merely because its effects are experienced by a developing State. The residual inquiry is more precise: after reasonably accessible shared science, regional cooperation and treaty support are considered, what constraint remains at the institution responsible for performance?

Remedial fit is a test of whether attribution has been done correctly. A lack of legal authority calls for a mandate or coordination rule; inaccessible data may call for a shared scientific service or interoperable information design; a concentrated livelihood effect may call for sequencing or transition support. Training does not resolve overlapping legal competence. Finance does not by itself redesign a treaty platform. A proposed remedy that does not reach the identified impediment is evidence that the causal diagnosis remains incomplete.

Table 1 converts this reasoning into a sequence. It is not a score and its elements are not compensatory. Severe vulnerability cannot make up for absent causation; direct causation does not establish practical significance; and practical significance does not establish a particular legal consequence.

Table 1. Attribution protocol for a treaty-relevant implementation constraint

Inquiry	Evidence required	Error screened out
Causal baseline and pathway	Measure or procedure; position without it; intervening domestic or sectoral act; route to the Party	Attribution of background costs or independently generated regulation
Task and bearer	Treaty function; responsible institution; legal authority; implementation timetable	Country-level claims that do not identify where performance fails
Operational significance	Concrete effect on timely participation, implementation, monitoring or adjustment	Treatment of every administrative expense as a legal burden
Comparator and distribution	Stated comparator; concentration; dependence; substitutes; relevant conservation benefits	Use of development status or ocean dependence as a complete proxy for disproportion
Location of scarcity	Domestic capability; shared resources; regional options; system-wide scientific or technical gaps	Assignment of global scarcity to national incapacity
Remedial fit	Whether authority, information, technology, finance, sequencing or transition support can remove the impediment	Assistance untethered to the function that prevents performance

Source: Author's synthesis of the BBNJ Agreement, especially arts 19-26, 41-42, 51-52 and 55, and the implementation literature cited above.

The protocol serves conservation as well as fairness. It prevents an unparticularised claim of hardship from operating as a veto over an ecologically justified measure. It also prevents an implementation problem from being dismissed because aggregate indicators

make a State appear capable. The question is narrower and more useful: which public function cannot be performed, why, and what intervention would make performance feasible without preserving the conduct that the measure is intended to regulate?

4. One Factual History, Different Legal Tests

4.1 Article 25(3): a category-specific implementation safeguard

Article 25(3) is specific in subject, beneficiary and consequence. It concerns implementation of measures adopted under Part III; it reaches burdens imposed directly or indirectly; and it names SIDS and LDC Parties. It does not refer to developing States generally. Nor does it say that a disproportionate burden suspends the COP decision, creates compensation, or constitutes a ground of objection. Those consequences must not be imported from the language of equity elsewhere in the Agreement.

The wording is nevertheless legally meaningful. Article 25(1) provides that Parties 'shall ensure' that relevant activities are conducted consistently with Part III decisions, whereas paragraph 3 states that implementation 'should not impose' a disproportionate burden on the named Parties.[24] The latter is not drafted as an absolute guarantee of a distributive outcome. But treating it as decorative would also be unsatisfactory, because the named beneficiaries would then receive no protection beyond the general support provisions. Its minimum practical effect is a duty of reasoned implementation: when credible evidence identifies a disproportionate burden, the institutions and Parties responsible for implementation should examine whether timing, design, sequencing or targeted support can remove it while preserving the decision's conservation objective.

The beneficiary class should not be expanded by implication. Negotiating records show that the scope of differentiated treatment remained contested during the fifth Intergovernmental Conference session and its resumption.[25] The final text nonetheless names SIDS and LDC Parties in Article 25(3), while using wider developing-State formulations in Parts V and VII. General references to equity in Article 7 can inform implementation, but they cannot erase those differentiated beneficiary lists.[26] Scholarship calling for stronger equity in ABMT governance identifies a legitimate concern, but the legally disciplined route

[24] BBNJ Agreement (n 1) art 25(1), 25(3).
[25] IISD Reporting Services, 'Daily Report for 19 August 2022: Fifth Session of the Intergovernmental Conference on BBNJ' (Earth Negotiations Bulletin, 19 August 2022). https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc5-daily-report-19aug2022. Accessed 02 September 2026; IISD Reporting Services, 'Summary Report, 20 February-04 March 2023: Resumed Fifth Session of the Intergovernmental Conference on BBNJ' (Earth Negotiations Bulletin, 07 March 2023). https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc5-resumed-summary. Accessed 02 September 2026.
[26] BBNJ Agreement (n 1) art 7(d), 7(m)-(n).

is to preserve Article 25(3)'s specific safeguard while addressing broader needs through provisions that expressly cover other developing Parties.[27]

Disproportion remains an evaluative judgment. SIDS or LDC status activates the safeguard; it does not prove that a particular measure is disproportionate. Once causation and operational significance are established, evidence of concentration, substitutability, timing, fiscal or administrative absorption and expected conservation benefits may become relevant to the chosen comparator. The decision-maker should state that comparator and explain why it fits the implementation question. This is the point at which factual continuity helps: a reliable record of the task and impediment can be reused, but Article 25(3) must perform its own distributive analysis.

4.2 Articles 41-42 and 52: need is not disproportion

The support architecture asks a different question. Article 41 recognises special requirements among developing States Parties; Article 42 requires capacity-building to be country-driven and responsive to needs and priorities identified at individual, subregional or regional levels; and Article 52 distributes financial resources on the basis of need and equitable sharing criteria.[28] A developing Party does not have to prove an Article 25(3) disproportionate burden in order to identify a capacity need or seek financial support.

Attribution therefore plays a different role in Parts V and VII. An inherited shortage of data infrastructure, an incremental demand generated by an ABMT consultation and a regional scientific deficit may all be relevant to capacity-building. The causal inquiry is useful because it identifies the function support should enable and the institution that must receive it; it is not an additional eligibility threshold. This distinction allows support to be broad without silently extending the beneficiary class or legal consequence of Article 25(3).

Needs assessment itself is becoming more structured. The United Nations Capacity-Building Needs and Priorities Assessment Toolkit includes a self-assessment questionnaire, key-informant interview, focus-group tool, SWOT analysis and needs-and-priorities review summary.[29] That architecture makes another generic list of weaknesses less useful than a function-specific account: which treaty task cannot be performed, at what institutional

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[27] Jiayu Bai, Kailei Zhu, Yi Wang and Yingyu Wu, 'The Realization of Equity in ABMTs, Including MPAs, under the BBNJ Agreement for Marine Ecosystem Resilience Strength in the Climate Change Context' (2024) 202 Journal of Sea Research 102551 <https://doi.org/10.1016/j.seares.2024.102551>.

[28] BBNJ Agreement (n 1) arts 41(3), 42(3)-(4) and 52(11)-(12).

[29] United Nations, Capacity-Building Needs and Priorities Assessment Toolkit (advance, unedited version). https://www.un.org/bbnjagreement/en/capacity-building-and-technical-assistance/tools-and-materials. Accessed 02 September 2026.

location, and what type of support would change that position? The answer can be carried forward from earlier consultation materials rather than recreated for each provider.

The Agreement places a limit on how such documentation is obtained. Capacity-building and technology transfer may not be conditioned on onerous reporting requirements, and financial procedures are to facilitate access rather than reproduce administrative exclusion.[30] Evidentiary continuity is therefore justified only if it reduces repeated production. It cannot become a new dossier that a Party must complete before support is available.

4.3 Article 55: facilitation requires diagnosis, not inherited judgment

Article 55 establishes an implementation and compliance mechanism that is transparent, non-adversarial and non-punitive and that may address both individual and systemic implementation issues while remaining cognisant of national circumstances.[31] Its function is facilitative. A prior needs assessment or consultation record may be highly relevant to why performance failed, but the compliance body is not an appellate forum for an earlier finding and should not treat that finding as conclusive.

The distinction between inability and unwillingness cannot be inferred from non-performance alone. A dated record can show when an obstacle was identified, which institution bore the task, what assistance was requested or offered, which alternatives were considered, and what constraint remained. Article 55(4) expressly allows the committee to draw on information from bodies established under the Agreement and from relevant external instruments and bodies.[32] The text supports retrieval of information, not deference to legal characterisation. The committee must still ask whether the earlier obstacle explains present non-performance, whether accessible support was used, and whether the problem is individual or systemic.

The reverse inference is equally important. Absence of a complete prior file should not be treated as proof of unwillingness where the Party lacked the capacity to create one. A continuity system must therefore preserve partial records and disagreement rather than reward only administrations capable of producing polished documentation.

4.4 Article 23(5)(c): an exceptional and time-specific threshold

Article 23(5)(c) is not a general fairness clause. A Party objecting to a Part III decision must explain in writing that it ‘cannot practicably comply with the decision at the time of the

[30] BBNJ Agreement (n 1) arts 41(3) and 52(12).
[31] BBNJ Agreement (n 1) art 55(1)-(3).
[32] BBNJ Agreement (n 1) art 55(4).

objection after making all reasonable efforts to do so'.[33] The objecting Party necessarily carries an initial burden of production because it invokes an objection and must state its ground. That procedural burden is distinct from a general duty to prove national incapacity. The substantive threshold remains decision-specific and demanding. Greater cost, domestic political difficulty or comparative disadvantage does not itself establish impracticability.

The temporal dimension makes continuity especially valuable. A Part III decision becomes binding 120 days after the COP meeting unless a valid objection is made during that period. An earlier consultation or support record may therefore contain facts that would be wasteful to reconstruct under time pressure. But reuse cannot substitute for the Article 23 inquiry. The COP must assess present practicability, the efforts actually made, feasible alternatives, assistance genuinely accessible during the relevant period, and any change since the earlier record.

The objection is also dynamic rather than a permanent opt-out. To the extent practicable, the objecting Party must adopt alternative measures or approaches equivalent in effect, must avoid undermining the decision subject to the Convention-based qualification in Article 23(6), must report, and must renew the objection every three years if it remains necessary.[34] New finance, technology, legal authority or scientific information may therefore change what is practicable. A continuity system must record changed circumstances as carefully as it preserves the original impediment.

Table 2. Factual continuity and differentiation of legal effect

Treaty setting	Legal question	Beneficiary/addressee	Use of prior facts	Possible consequence
Arts 19-21: proposal/consultation	What tasks and foreseeable constraints accompany the proposed measure?	Proponents, consulting Parties and stakeholders	Creates and tests the initial factual account	Revision of proposal/management plan; identification of support needs
Art 25(3)	Would implementation impose a disproportionate direct or indirect burden?	SIDS and LDC Parties	Reuses attribution and distribution facts but applies a category-specific comparator	Adjustment of implementation, sequencing or targeted support; no automatic exemption
Arts 41-42, 52	What need prevents effective participation or implementation?	Developing States Parties, with specified priority categories	Links a need to the function support would enable	Capacity-building, technology transfer or needs-based finance

[33] BBNJ Agreement (n 1) art 23(4)-(5).
[34] BBNJ Agreement (n 1) art 23(6)-(9).

Treaty setting	Legal question	Beneficiary/addressee	Use of prior facts	Possible consequence
Art 55	Why did implementation fail and what would facilitate compliance?	Parties and the treaty system	Tests history of obstacle, support and residual constraint	Non-adversarial recommendation or facilitative response
Art 23(5)(c)	Can the Party practicably comply now after all reasonable efforts?	Any Party objecting to a specific Part III decision	Updates obstacle, efforts, alternatives and changed circumstances	Time-limited objection plus equivalent alternatives, reporting and renewal

Source: Author's synthesis of BBNJ Agreement arts 19-25, 41-42, 51-52 and 55.

The rule that follows from Table 2 is asymmetric: reuse should be strongest at the level of verified fact and weakest at the level of legal conclusion. A dated record that an agency could not access a required dataset may remain probative across consultation, support and compliance. A prior conclusion that the problem amounted to a 'need' should have no presumptive legal force when the later question is disproportion or practicability. That limiting principle prevents evidentiary continuity from becoming de facto precedent.

5. UNFSA as a Contrast in Institutional Architecture

UNFSA offers a useful comparison because its developing-State provisions keep vulnerability, conservation burden and assistance close together. Article 24 directs States to recognise the special requirements of developing States, including dependence on living marine resources, nutritional requirements and the need to avoid adverse effects on subsistence, small-scale and artisanal fishers. It also requires cooperation so that conservation action does not transfer a disproportionate burden to developing States. Articles 25 and 26 then address assistance and implementation.[35]

The comparison does not supply a definition of 'disproportionate' for BBNJ. UNFSA regulates straddling and highly migratory fish stocks, where conservation measures and fishing opportunities can have relatively direct distributive consequences. Part III of BBNJ relies on spatial and other area-based measures while preserving important authority in sectoral instruments and bodies. Fisheries effects may therefore be indirect, and ecological benefits may be diffuse, cross-sectoral or delayed. A metric developed for catch or effort allocation cannot simply be transplanted into ABMT implementation.

The institutional lesson is more durable. Under UNFSA, dependence, conservation burden and assistance are addressed within adjacent provisions directed to the same

[35] UNFSA (n 12) arts 24-26.

cooperative problem. Under BBNJ, the factual history may move across consultation, the STB, the CHM, capacity-building, finance, compliance and objection. The need for legal translation is therefore generated partly by institutional distance. BBNJ does not lack equity-related provisions; it separates their functions.

Fisheries scholarship reinforces the importance of keeping different questions apart. Azmi and co-authors show the difficulty of defining disproportionate burden without a stated basis of comparison.[36] Haas and co-authors demonstrate that remedial pathways depend on how the burden is identified and that different distributive principles can produce different allocation outcomes.[37] Work on differentiated rights adds historical position and capability, while conservation-justice scholarship shows that causation, capacity and benefit are distinct grounds for allocating burdens.[38] These are not BBNJ legal tests. Their relevance is methodological: income, development category, livelihood dependence, historic use and absorptive capacity answer different questions and should not be collapsed into a single vulnerability score.

'Ocean dependence' is therefore evidence, not status. The BBNJ Agreement does not define the term. Fisheries employment, export revenue, dietary reliance, coastal livelihoods and ecological connectivity describe different relationships. Employment may show concentration; food-security evidence may show limited substitutes; ecological connectivity may indicate exposure to both transition costs and conservation benefits. A composite index can conceal which legal inference is being drawn. Under BBNJ, dependence becomes probative only after the measure-related task and causal pathway have been identified.

The comparison also guards against conflating State capacity with intra-State vulnerability. A ministry may be able to implement a decision even where adjustment falls heavily on a fishing community. Conversely, severe household vulnerability does not by itself establish that the State cannot perform a treaty task. Social evidence enters the BBNJ analysis through a legally identified public function - consultation, transition planning,

[36] Kamal Azmi, Ruth Davis, Quentin Hanich and Adam Vrahnos, 'Defining a Disproportionate Burden in Transboundary Fisheries: Lessons from International Law' (2016) 70 Marine Policy 164 <https://doi.org/10.1016/j.marpol.2016.05.007>.
[37] Bianca Haas, Kamal Azmi, Hussain Sinan and Quentin Hanich, 'Policy Pathways to Reduce Disproportionate Burdens in Tuna Fisheries' (2024) 25 Fish and Fisheries 542 <https://doi.org/10.1111/faf.12823>; Bianca Haas, Rachel Nichols and Kamal Azmi, 'Be Careful What You Wish (Fish) For: Actioning Distributive Equity Principles When Determining Catch Limits in Transboundary Fisheries' (2025) 179 Marine Policy 106752 <https://doi.org/10.1016/j.marpol.2025.106752>.
[38] Hussain Sinan, Megan Bailey, Quentin Hanich and Kamal Azmi, 'Common but Differentiated Rights and Responsibilities in Tuna Fisheries Management' (2022) 23 Fish and Fisheries 202 <https://doi.org/10.1111/faf.12610>; Chris Armstrong, 'Sharing Conservation Burdens Fairly' (2019) 33 Conservation Biology 554 <https://doi.org/10.1111/cobi.13260>.

monitoring, enforcement or representation in a sectoral body - through which the distributional effect must be addressed.

UNFSA's contribution to the present argument is thus institutional rather than transplantational. It shows the value of keeping vulnerability evidence connected to the decision in which it performs legal work. BBNJ's more fragmented architecture requires a conscious mechanism to achieve that connection without assuming that the same fact has the same legal meaning in every forum.

6. Domestic-International Implementation Interfaces in Southeast Asia

6.1 Viet Nam: a legislative-adaptation record

Viet Nam's 2026 marine-law reform process provides a concrete example of legislative provenance. A June 2026 legal-policy analysis of the 2015 Law on Marine and Island Resources and Environment identifies the need to update the domestic framework in light of international commitments and expressly includes the BBNJ Agreement among those commitments.[39] The source supports a narrow proposition: domestic marine legislation is under revision partly because the international legal environment has changed and BBNJ is one of the relevant commitments.

The source does not establish that a particular BBNJ rule is missing from Vietnamese law, that Viet Nam lacks scientific capacity, that a future ABMT will burden Vietnamese fisheries, or that compliance with a COP decision will be impracticable. Those propositions would require different evidence. The value of the document is that it locates an implementation task: legal mapping and adaptation of the domestic marine-governance framework.

That distinction changes the institutional response. Article 25(3) is not applicable on the present facts because Viet Nam is outside the named beneficiary class and because no measure-related burden has been shown. Parts V and VII may nevertheless be relevant if Viet Nam identifies a need for legislative mapping, specialist drafting, institutional coordination or information systems. If a later compliance issue concerns the same legal-adaptation task, a dated reform record can show when the issue was identified and what institutional response followed. It cannot establish current inability by itself.

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[39] Nguyễn Thanh Tùng and Phạm Thị Gấm, 'Cơ sở lý luận và thực tiễn về sự cần thiết sửa đổi, bổ sung Luật Tài nguyên, môi trường biển và hải đảo' (Tạp chí Môi trường, 05 June 2026). https://tapchimoitruong.vn/co-so-ly-luan-va-thuc-tien-ve-su-can-thiet-sua-doi-bo-sung-luat-tai-nguyen-moi-truong-bien-va-hai-dao-15898.html. Accessed 02 September 2026.

Continuity here produces temporal accountability rather than a stronger entitlement. A later body can ask whether an identified legal task was completed, whether support addressed it, whether a new mandate removed the obstacle, or whether the issue was overtaken by subsequent legislation. Without the earlier record, the same implementation history may be redescribed as if it first appeared at the compliance stage.

6.2 Indonesia: a coordination-authority record

Indonesia's May 2026 consultation on a national BBNJ task force documents a different institutional problem. The Food and Agriculture Organization records that some ministries and agencies had not formally confirmed participation, affecting the organisational structure of the proposed implementation coordination team and hindering finalisation and harmonisation of the draft ministerial decree intended to provide its legal basis.[40] The same account identifies the practical risks of an unclear legal basis: overlapping authority, institutional constraints and limitations in accessing funding support and international cooperation.

This is stronger evidence of an implementation-preparation problem than a general assertion of insufficient capacity because it identifies the legal instrument under development, the institutional actors whose commitment remained unresolved and the functions that could be affected. It still does not prove a legally relevant burden caused by a Part III measure. No ABMT measure is identified. The documented task is prior: allocation of authority across a cross-sectoral agreement.

Indonesia's large small-scale fisheries sector may become highly relevant if a future ABMT affects particular fishing activities, but it cannot fill the present causal gap.[41] A later claim would still need to connect the specific measure, the affected resource or activity, the implementing task and the institution responsible for that task. Dependence can illuminate distribution only after that pathway exists.

The remedial implication is correspondingly specific. Training officials or providing additional project finance does not decide which ministry may coordinate implementation, formulate a funding request or represent the State across sectoral interfaces. The prior remedy is an authorised coordination structure with defined membership, powers and decision rights.

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[40] Food and Agriculture Organization of the United Nations, 'Final Consultation Meeting for the Establishment of Indonesia's National BBNJ Task Force Team' (Bogor, 18-19 May 2026). https://www.fao.org/indonesia/events/final-consultation-meeting-for-the-establishment-of-indonesia-s-national-bbnj-task-force-team/en. Accessed 02 September 2026.

[41] Food and Agriculture Organization of the United Nations, 'Small-Scale Fisheries in Indonesia' (Food and Agriculture Organization of the United Nations). https://www.fao.org/voluntary-guidelines-small-scale-fisheries/in-action/where-we-work/indonesia/. Accessed 02 September 2026.

A continuity record can prevent a later institution from misdiagnosing an authority problem as a generic shortage of expertise.

6.3 Philippines: a common-infrastructure record

The Philippine material concerns a third evidentiary location: design of treaty-level infrastructure. The United Nations record confirms a Philippine written submission, dated 26 January 2026, to the consultancy on the technical operationalisation of the CHM.[42] The existence of that submission establishes participation in the design process. It does not by itself establish a national digital deficit, a scientific-capacity problem or any inability to use the eventual platform.

Article 51(5), however, makes accessibility a legal design concern by requiring access for developing States without undue obstacles or administrative burdens.[43] This provision changes the direction of attribution. If an implementation problem arises because the common platform cannot be used effectively under materially different infrastructure, language or interoperability conditions, the causal field includes the treaty system itself. The responsible national agency may adapt internal processes, but it cannot unilaterally redesign the CHM.

The analytical point is not that every accessibility difficulty violates Article 51(5). It is that a common system can generate implementation costs and that attribution must be capable of reaching international institutional design rather than defaulting to a narrative of national incapacity. A later support or compliance body should therefore ask whether the impediment lies in domestic capability, the shared platform, or the interface between them.

6.4 Comparative implications for Global South implementation

Table 3 consolidates the three implementation interfaces and makes explicit the distinction between inferences supported by the documentary record and stronger conclusions that the evidence cannot sustain.

Table 3. Documentary provenance and limits of inference

Case	Documented task	Institutional locus	Supported inference	Unsupported inference

[42] United Nations, 'Written submissions to inform the work of the consultancy for a study on the technical aspects of the operationalization of the Clearing-House Mechanism' (United Nations). https://www.un.org/bbnjagreement/en/chm-consultancy-written-submissions. Accessed 02 September 2026.
[43] BBNJ Agreement (n 1) art 51(5).

Case	Documented task	Institutional locus	Supported inference	Unsupported inference
Viet Nam	Revision of domestic marine-law framework in light of international commitments including BBNJ	Legislative adaptation and legal coordination	2026 reform material identifies BBNJ among commitments relevant to legal updating	A future Part III measure will impose a disproportionate burden or exceed national capacity
Indonesia	Establishment of a national BBNJ implementation coordination team	Membership, legal authority and cross-ministerial responsibility	Unsettled authority can impede coordination, funding access and international cooperation before technical implementation begins	Fisheries dependence proves exposure to a future ABMT
Philippines	Participation in technical operationalisation of the CHM	Shared treaty information infrastructure	Official record confirms Philippine participation; Art 51(5) makes accessibility legally relevant to design	The submission proves weak national scientific or digital capability

Source: Author's synthesis of the 2026 Viet Nam marine-law reform material, the FAO record of Indonesia's national BBNJ task-force consultation and the United Nations CHM submissions record.

The three examples do not establish three national 'capacity deficits'. They identify three implementation interfaces. The Vietnamese record is legislative; the Indonesian record is organisational and authority-based; the Philippine record concerns participation in common-infrastructure design. Their legal significance follows the location of the task. Support for legislative mapping is different from a rule allocating executive authority; both are different again from redesigning a treaty interface. The comparison therefore treats capacity as relational to a function and an institution, not as a fixed property of a State.

The comparison also clarifies why the non-SIDS cases should not be forced into Article 25(3). Their role is to show how broader developing-State needs and implementation histories arise outside that category-specific safeguard. Article 25(3) remains available for SIDS and LDC Parties when a Part III measure produces the required causal and distributive showing. The present record does not contain a mature example of such a measure. The article's contribution is therefore to specify what evidence should be preserved before that dispute arises, not to declare that it already has.

Taken together, the cases yield a locus-responsibility-remedy heuristic. Where the problem is legislative, the immediate response lies in legal adaptation and allocation of implementing powers. Where it is organisational, the prior issue is authorised coordination. Where it is embedded in shared information infrastructure, the treaty system itself enters the

causal chain. This matters for Global South implementation because external assistance often reaches States through broad labels such as technical assistance, finance and capacity-building, while the actual obstacle may instead be legal authority or system design. Implementation equity can therefore require institutional self-correction by international bodies as well as capacity transfer to States.

The broader Global South implication is institutional rather than categorical. The Agreement does not create a single legal status for the Global South, and the present evidence cannot support a common model of incapacity. Yet developing-State administrations will repeatedly encounter the same treaty bodies, shared information infrastructure and support channels. A continuity protocol can reduce the transaction costs of those interactions without allowing labels such as 'developing State' or 'capacity constraint' to substitute for the beneficiary and threshold rules governing an individual claim. The comparative value is diagnostic: similar treaty membership can conceal different locations of responsibility, and those differences should determine both the evidence preserved and the remedy offered.

7. Designing Continuity without Creating a New Reporting Burden

7.1 A common factual core, not a common legal test

The institutional problem is not absence of treaty bodies. It is discontinuity of reasons. A constraint may appear during consultation, be reframed as a technical question before the STB, become a support request, and later matter to compliance or objection. If every forum starts again, scarce administrative capacity is consumed and institutional learning is lost. If an earlier legal conclusion is carried forward automatically, negotiated thresholds are collapsed. The solution is a shared factual core that remains separable from each body’s legal characterisation.

That core should be short. Six fields are sufficient: (1) the measure or procedure implicated; (2) the treaty task and institution responsible; (3) the relevant timetable; (4) the observed impediment and its asserted source; (5) assistance or alternatives requested, offered and used; and (6) changed circumstances. Each entry should identify its date and source. The record should preserve disagreement. A Party’s account, an STB assessment and a support provider’s description of available assistance need not be collapsed into a false consensus.

The categories are evidentiary, not substantive. They do not define disproportionate burden, create eligibility for finance or change the Article 23 threshold. Their function is to make later reasoning auditable. A decision-maker should be able to explain which facts were

accepted, which remained disputed, what changed, and why the same history produced a different legal result under a different provision.

7.2 Dividing the burden of production

Responsibility for producing the record should follow control over information. The proponent of an ABMT can identify the regulatory, monitoring and reporting functions assumed by the draft management plan. An affected Party is best placed to identify the domestic institution, legal authority and local implementation pathway. The STB can evaluate scientific feasibility and alternatives. Capacity-building and finance bodies can record what support was requested, offered, available and used. The Secretariat or CHM can preserve cross-references among those contributions.

This allocation is more equitable than requiring one State to prove every link, and more reliable than accepting a self-characterised burden without technical scrutiny. It also fits existing procedures. Article 19 requires an ABMT proposal to include a draft management plan, including monitoring, research and review; Article 21 requires consultation and consideration of substantive inputs.[44] Proponents cannot predict every domestic difficulty, but they can identify the implementation functions their proposal assumes. Consulting Parties can then locate the responsible institution and specify a plausible constraint. A short entry embedded in those documents is sufficient; a separate ‘equity report’ would defeat the purpose.

7.3 Reuse, updating and independent legal judgment

Once a task-specific issue has been recorded, Article 42(4) permits needs assessment to be conducted by the Party or facilitated by the Capacity-Building and Transfer of Marine Technology Committee and the CHM. Article 51 gives the CHM matching and information functions relevant to support and ABMT implementation.[45] Those provisions provide an institutional bridge: the original account can be supplemented rather than reproduced. A support request would still identify the assistance sought, but it should not need to reconstruct the same factual chronology in a new format.

Finance must retain independent allocation judgment. A prior record may establish why a request is connected to implementation, but it cannot guarantee funding. Article 52 assigns the COP and financial mechanism responsibilities for priorities, need, equitable sharing,

[44] BBNJ Agreement (n 1) arts 19(4)(j) and 21(5)-(6).
[45] BBNJ Agreement (n 1) arts 42(4) and 51(3)(b), 51(4)(c)-(d).

timely disbursement and accountability.[46] Continuity supplies relevant information; it does not resolve scarcity or displace eligibility rules.

Article 55 provides the clearest textual bridge because the compliance committee may draw on information from other treaty bodies and relevant external institutions. By the time a problem reaches compliance, the record should show when it was identified, what response was attempted and what remained unresolved. The committee can then determine whether the issue is individual or systemic and what facilitative response is warranted. It remains free to reject a weak causal claim, to find that available support was not used, or to conclude that the treaty system itself failed to provide an accessible route to performance.

Article 23 remains legally independent. An existing record can make an objection under paragraph 5(c) testable, but no earlier body can decide practicability by proxy. The COP must retrieve the earlier facts, state the legal question now before it, separate those facts from the previous legal characterisation, update the record for efforts, alternatives and changed circumstances, and explain its conclusion under Article 23. This is the operational meaning of factual continuity with legal recharacterisation.

7.4 Safeguards against proceduralising equity

Four safeguards are necessary. First, continuity must comply with the prohibition on onerous reporting and Article 51(5)'s concern with administrative burdens. The common factual core should be embedded in proposal, consultation, needs-assessment and reporting formats that already exist. It must not become a precondition that delays urgent support.

Secondly, incompleteness should not by itself generate an adverse inference. A thin record may reflect the very constraint under examination. A treaty body may request clarification or facilitate production, but it should not convert formatting quality into a proxy for credibility or willingness.

Thirdly, the record must remain contestable. Continuity means that evidence and reasons remain visible, not that an early characterisation becomes precedential. A proponent, Party, technical body or support provider may disagree about causation, practical significance or remedial fit. Later bodies should record why they accept, qualify or reject an earlier inference.

Fourthly, accessibility cannot override confidentiality. Article 51(6) protects information shielded by domestic or other applicable law.[47] Public transparency should therefore focus on

[46] BBNJ Agreement (n 1) art 52(3), 52(6), 52(11)-(12).

the task, reasoning and institutional response, while sensitive operational, personal or commercial information is handled under applicable rules.

The COP can operationalise these safeguards without creating a new institution. The Agreement already authorises development of proposal and consultation guidance, determines CHM modalities and requires rules for the implementation and compliance mechanism.[48] A common vocabulary and a cross-reference field across those instruments would be enough to create reasoned continuity. A new equity committee, mandatory scoring system or centralised burden tribunal would add transaction costs before the first implementation cycle has stabilised.

The design also answers a conservation concern. Recording constraints can be abused strategically if every assertion of hardship delays an ABMT. The attribution protocol reduces that risk because it requires a connection to a specific task and operational effect, keeps support distinct from exemption, and reserves impracticability for Article 23's higher threshold. The factual record should ordinarily travel alongside decision-making rather than suspend it. Design adjustment, sequencing and support can be considered without reopening the scientific justification for the measure each time a new institutional forum is engaged.

The proposal is intentionally low-institutionalisation. Its novelty lies not in creating another procedure but in specifying how existing procedures should remember. During the first implementation cycle, a new reporting layer would impose costs before practice is settled; a short, dated, source-linked and contestable record can instead be built into instruments that Parties and treaty bodies must develop anyway. The model is portable only under defined conditions: different procedures must rely on overlapping factual questions, retain independent legal thresholds and possess an institutional route for retrieving or cross-referencing prior information. Where those conditions are absent, 'continuity' risks either creating an unnecessary dossier or importing a legal conclusion into a forum that lacks competence to use it. This limiting rule turns the proposal from a BBNJ-specific administrative suggestion into a more general model for fragmented international legal regimes without assuming that every regime should share evidence.

8. Conclusion

The BBNJ Agreement allocates implementation problems twice: legally, across different beneficiary classes and thresholds; institutionally, across national agencies, treaty bodies and

[47] BBNJ Agreement (n 1) art 51(6).
[48] BBNJ Agreement (n 1) arts 19(5), 21(8), 49(2), 51(2)-(3) and 55(2).

sectoral organisations. A generic account of national ‘capacity’ obscures both allocations. Article 25(3), Parts V and VII, Article 55 and Article 23(5)(c) do not express one sliding scale of equity. They perform different legal work.

The article’s central proposition is correspondingly narrow. A reliable factual history should remain available across BBNJ procedures, but each decision-maker must characterise that history under the legal test governing the question before it. Attribution comes first: the measure or procedure must be connected to the position without it, any intervening act, the treaty task, the responsible institution and the operational impediment. Distributional evidence can then illuminate incidence and substitutability; it cannot replace causation. Where ‘disproportionate’ is the test, the comparator must be stated rather than assumed.

The doctrinal payoff is fidelity to negotiated differentiation without institutional amnesia. A need identified under Article 42 is not disproportion under Article 25(3). A prior burden analysis is not impracticability under Article 23(5)(c). Yet the underlying facts - who had to do what, by when, with which authority or information, what support was available and what changed - need not disappear each time the applicable provision changes.

The documentary materials from Viet Nam, Indonesia and the Philippines illustrate the discipline. They show legislative adaptation, unsettled coordination authority and participation in CHM operationalisation. They do not prove realised burdens from Part III measures. Read correctly, however, they identify different institutional loci and therefore different remedial pathways. The analysis also explains why Article 25(3) should not be artificially ‘tested’ through non-SIDS cases: its category-specific safeguard should be applied when a qualifying Party and a measure-related burden actually exist, not by analogy to a broader developing-State need.

For Global South implementation, the comparison supports a more defensible proposition than a readiness ranking. The Vietnamese, Indonesian and Philippine records do not describe a common regional or developmental deficit; they show that formally shared treaty obligations can enter domestic legal orders through different administrative sites. Legislative adaptation, executive coordination and treaty-level information design require different actors and remedies. Treating those differences as evidence of one undifferentiated capacity problem would reproduce the very abstraction that the support architecture is meant to overcome. The relevant question is therefore not whether a State is 'capable' in the aggregate, but which legally identified function is impeded and where responsibility for removing the impediment lies.

The practical recommendation is modest: embed a short common factual core in existing proposal, consultation, needs-assessment, finance and compliance processes; divide production according to who controls the information; preserve disagreement and confidentiality; update changed circumstances; and require every later institution to state its own legal threshold. The arrangement reduces repetitive evidentiary production without creating presumptions, precedent or a new reporting obligation.

The broader significance extends beyond BBNJ. In fragmented international regimes, equality of formal access can coexist with unequal administrative costs of using institutions. When support, finance, monitoring and compliance bodies repeatedly demand the same factual history, evidentiary production itself becomes part of the governance burden. Factual continuity offers a limited response: preserve reliable information, divide production according to control over it, update changed circumstances and require every institution to apply its own legal test. That approach neither equalises substantive obligations nor turns Global South status into a defence. It makes the interaction between international institutions and domestic legal orders more administrable while preserving the negotiated differences among legal thresholds.

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