

BBNJ IGC-5.2 Highlights: Tuesday, 21 February 2023

The resumed fifth session of the Intergovernmental Conference (IGC-5.2) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) continued at UN Headquarters in New York, US, on Tuesday, 21 February 2023. Delegates met in two parallel informal-informal consultations in the morning and in the afternoon. They considered articles related to: environmental impact assessments (EIAs); various cross-cutting issues; and marine genetic resources (MGRs), including questions on the sharing of benefits. Delegates also met in small groups to discuss capacity building and the transfer of marine technology, EIAs, and area-based management tools, including marine protected areas.

Informal-Informal Discussions

General Provisions: Kurt Davis, Jamaica, facilitated these discussions. On the **general objective** (article 2), one country, supported by many others, proposed to add to the objectives of conservation and sustainable use of marine biological diversity, “and the sharing of benefits thereof,” to align it with other international agreements such as the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). Some countries opposed the addition, preferring the original formulation. Another delegate said the objective is to be aligned with the UN Convention on the Law of the Sea (UNCLOS), and requested adding “in accordance with relevant international agreements.” Facilitator Davis encouraged informal consultations.

On **application** (article 3), many supported the provision which specifies that the agreement applies to areas beyond national jurisdiction (ABNJ) with one delegation suggesting specifying “marine areas” or referring to the high seas instead. One regional group, supported by others, proposed amending the title to “scope of application.”

On **sovereign immunity** (article 3 bis), one regional group proposed deletion of the article, noting that most vessels engaged in exploitation are state-owned, which would make implementation difficult. Another group supported deletion to avoid duplicating UNCLOS Article 236 (sovereign immunity). Some of those in support of retaining the article called to rename it to “exceptions,” noting that this better reflects the article which does not apply to sovereign immune vessels, including warships, military aircraft, and naval auxiliary.

On the **relationship between this agreement and UNCLOS and relevant international frameworks and bodies (IFBs)** (article 4), one regional group called for the agreement to be

interpreted in a manner that “respects the competences of, and does not undermine,” relevant IFBs. Another regional group proposed that the agreement be interpreted in a manner “not undermining the effectiveness of measures” by relevant IFBs. This was opposed by several delegations. One delegation stressed that the agreement could play a central role in recovering fish stocks, which are on the decline despite the existence of IFBs. Another regional group suggested that the agreement promotes “mutual support, coherence, and coordination ... in achieving the objectives” of UNCLOS and this agreement. Some queried whether this would create a hierarchy between the BBNJ agreement and existing and future IFBs. The regional group will provide an updated suggestion.

One negotiating bloc, supported by some delegations, underscored the importance of retaining a paragraph addressing the legal status of non-parties to UNCLOS, noting that this will further the universal acceptance of the agreement. One regional group, supported by some delegations, made a strong call to delete this language, noting that it could undermine the interpretation of both the agreement and UNCLOS.

One delegation called to delete the entire article, if no agreement is forthcoming, underlining that the text of the agreement should not undermine existing IFBs.

Facilitator Davis encouraged bilateral discussions to address outstanding issues.

Regarding the **without prejudice** provision (article 4 bis) relating to other claims of sovereignty and maritime disputes, many welcomed the text which was the outcome of small group discussions during the first part of IGC-5.

On **general principles and approaches** (article 5), many countries and regional groups called to include, among others, the principle of equity, pointing to intergenerational equity, and the principle of fair and equitable sharing of benefits, highlighting distributive and environmental concerns. Many insisted on the precautionary principle, with others preferring the precautionary approach. With regard to the common heritage of humankind, which was supported by many, one delegation said they could only accept this if it was linked to a reference to the freedom of the high seas. Noting that the focus of these negotiations is to address the biodiversity crisis, one delegate proposed additional text on “an approach that supports the conservation of biodiversity services to enable the ocean to provide climate mitigation.” Discussions will continue.

MGRs: Facilitator Janine Coye-Felson, Belize, opened the session by giving a brief overview of the work conducted by the small group on issues related to access and benefit sharing (ABS) of MGRs. The group also touched on the implication of the

decision of DSI under the CBD on this part of the agreement, and convened a small group on the issue for Thursday morning.

Stating that there are still different interpretations of many provisions, she said there is a common understanding of what has to be achieved through this part. On the **ABS mechanism** (art 11.bis), acknowledging that the first paragraph establishes the mechanism, one group proposed to add that “it shall serve, *inter alia*, as a means for establishing mandatory guidelines for benefit-sharing, in accordance with article 11, providing transparency and ensuring a fair and equitable sharing of both monetary and non-monetary benefits.” One delegation, with the support of a few others, proposed changing the title of the article, to ABS committee rather than mechanism.

Regarding the matters on which the ABS mechanism will make recommendations to the COP, a group of countries suggested developing guidelines or a code of conduct for all activities related to MGRs and DSI. Another group opposed, noting the need to preserve the scientific community’s bottom-up approach and various delegations requested clarifications. A regional group called for removing brackets around making recommendations on the rates or mechanisms for the sharing of monetary benefits in accordance with article 11. A delegate suggested adding matters related to the distribution of benefits on the conservation and sustainable use of biodiversity in ABNJ. A lengthy discussion ensued with differing views on whether “rules” should also be developed.

A coalition of countries tabled a full textual proposal, suggesting recommendations on: assessments of research and development activities based on MGRs of ABNJ; potential commercialization of products; appropriate modalities to operationalize CB&TT projects; and the operation of the clearinghouse mechanism. One delegate expressed concern regarding the proliferation of potential subsidiary bodies.

On **transparency and traceability** (article 13), a group of countries suggested changing the article’s title to “monitoring, compliance, and transparency.” They also suggested that monitoring and transparency for MGRs and DSI shall be achieved through notification to the clearinghouse mechanism, use of batch identifiers, and any relevant compliance measures should be elaborated in accordance with article 11 bis. The group proposed that parties submit reports to the ABS mechanism on their implementation of the provisions on all activities with respect to MGRs and DSI of ABNJ and the sharing of benefits thereof.

Some delegates expressed satisfaction with the draft text in the further refreshed document and queried the links between transparency, and monitoring and compliance measures, including whether the ABS mechanism will be mandated to monitor and establish compliance measures. A delegate cautioned that DSI does not link well with traceability, pointing to the recent CBD decision. Another noted that the use of batch identifiers is not practical.

Other delegates highlighted that the implementation and compliance parts of the agreement were under discussion, with one delegation expressing concern about the creation of two parallel systems to deal with compliance.

Regarding **application** (article 8), some delegations expressed support for the facilitator’s previous text proposal, and the non-retroactive provision on the temporal scope. A negotiating bloc, supported by regional groups, raised a procedural point, indicating that this text was not included in the compilation of the small group, so it was not available for proper analysis.

One delegation asked for the addition of a reference to ABS. Another delegation highlighted that the heart of this provision is that it does not apply to any activity that occurs before the entry into force of the treaty. One regional group highlighted that MGRs collected before the entry into force of the agreement but used after entry into force, should also be covered in this article. A few delegates noted that application of the provisions on MGRs collected before the entry into force of the agreement will create legal uncertainty.

On the material scope of the agreement, facilitator Coye-Felson drew attention to the outcome of the work of a small group, noting that “the provisions of this part shall not apply to fishing and fishing related activities, and to fish [and other biological resources] except where MGRs of ABNJ, [if known,] are regulated as utilization under this part.”

Some delegates noted that there is general agreement on excluding fishing-related activities. A few said that not all countries participated in the small group discussions. A few delegations stressed that fishing and fishing-related activities should be excluded throughout the agreement and not just for the part on MGRs. Some noted that focusing on an activity-based approach can offer a solution.

A delegate suggested also excluding fishing-related scientific research activities. Another emphasized that the language as drafted is convoluted. A delegate insisted on referring to fish and other living marine resources, while others opined that reference to fish suffices, pointing to the relevant definition under the UN Fish Stocks Agreement. A delegate further pointed to the definition on fishing-related activities under the Agreement on Port State Measures.

Facilitator Coye-Felson noted that challenges related to the temporal and material scope of the agreement remain, urging for flexibility and adding that discussions will continue in a small group.

EIAs: René Lefeber, the Netherlands, facilitated the session. Delegates addressed the **obligation to conduct EIAs** (article 22). On the *activity- versus impact-based approach*, the further refreshed draft text of a BBNJ agreement contains three options. Facilitator Lefeber noted that during the discussions at the first part of IGC-5, many delegations expressed their preference for option two, which provides flexibility to countries to either follow the provisions of the BBNJ agreement or those of relevant national processes.

One delegate rejected all three options, noting that the future treaty should only contain general principles on how the obligation for these assessments would arise. A group of delegations provided a joint statement, noting that imposing obligations on coastal states within their jurisdictions goes beyond the BBNJ mandate.

Discussions continued based on the second option. On the threshold for this article, many delegates suggested replacing activities that are “likely to have more than a minor or transitory effect in ABNJ” with activities that “may cause substantial pollution of, or significant and harmful changes to the marine environment,” consistent with UNCLOS Article 206 (assessment of potential effects of activities). Some delegates requested reference to marine ecology in addition to the marine environment.

A lengthy discussion took place on the notion of “substantive equivalence,” between relevant national legislation and EIA provisions under the new treaty. Many queried its meaning, requesting deletion. A delegate asked about decision-making

related to substantive equivalence. Some requested replacing the reference to “national legislation” with “national processes.”

Delegates further exchanged opinions on whether the party that conducts an EIA should notify the Scientific and Technical Body to provide comments during the consultation process or whether relevant information should be made available through the clearinghouse mechanism, without reaching consensus.

Regarding an *obligation for the party conducting the EIA* to ensure that the activity is subject to monitoring, reporting, and review, as provided in this part of the agreement, many delegates suggested ensuring that the activity is monitored in a manner consistent with the requirements of national processes. They further suggested ensuring that all EIA and monitoring reports be published through the clearinghouse mechanism.

On the **threshold** (article 24.1) for conducting EIAs, comments centered on the use of the “less than minor or transitory effect” threshold or the “substantial pollution of or significant and harmful changes to the marine environment” as under UNCLOS Article 206, and one tiered approach as an in-between option. A like-minded group presented an alternative text that integrates both options as a compromise way forward.

Some delegates expressed their strong preference for the use of the UNCLOS threshold. Other delegations supported a tiered approach with a formulation similar to the Antarctic Protocol, with some strong opposition and some support. A delegation noted that the high seas ecosystem is less fragile than the Antarctic, with a delegate replying that the whole Ocean is sensitive and that BBNJ should go beyond the UNCLOS threshold. Another delegation highlighted that an excessively high threshold would create a treaty that no one respects. Progress was made on the factors or criteria to determine the meeting of the threshold (article 24.2), finishing the session with clean text on this paragraph and its list. Only one delegation objected to retaining the paragraph.

Delegates then addressed **decision making for EIAs** (article 38), focusing on the decision-making standard. A group of countries suggested that a decision to authorize the planned activity under the jurisdiction or control of a party shall only be made when the party determines, and shall include consideration as to whether the activity can be conducted in a manner consistent with the avoidance of significant adverse impacts on the marine environment. One delegate, supported by some, suggested adding avoidance besides mitigation of “substantial pollution of or significant and harmful changes to the marine environment.” A group of countries proposed referring to prevention rather than avoidance, further underscoring the need for consistency with other EIA-related provisions. Some delegates emphasized that discussing such a decision-making standard is predicated on having state-led decision making as opposed to global decision making under the COP.

A small group met on Tuesday afternoon to address these and other issues.

Cross-cutting issues: Victoria Hallum, New Zealand, facilitated the discussion on implementation and compliance, and dispute settlement. Delegates agreed to the articles on **implementation** (article 53) and **monitoring of implementation** (article 53 bis) with changes based on the small group discussions during the first part of IGC-5. They also introduced respective changes to the provision on the **implementation and compliance committee** (article 53 ter). One country questioned the need for a compliance committee.

Delegates deleted a reference to the committee being “expert-based,” while maintaining reference that its work is facilitative

in nature, transparent, non-adversarial, and non-punitive. They agreed that the committee shall consist of members possessing appropriate qualifications and expertise and that due consideration be given to gender balance and equitable geographical representation. While some countries preferred keeping the reference to serving objectively and in the best interest of this agreement, they agreed to delete it, due to opposition by others. A number of countries wanted to keep reference to compliance at the individual and systemic levels, with one party asking to add “at the request of the party concerned.” The addition was opposed by others and remains under consideration. One party asked to delete the reference to “cognizant of respective national capabilities and capacities” and later made a proposal to refer to “national capacities” instead, which remains under consideration.

One regional group proposed new language (part VIII bis) related to **liability for loss and damage**, which notes that “Parties shall elaborate rules and procedures relating to liability and compensation for damage or loss arising from activities taking place in ABNJ.” Two regional groups supported this suggestion, but a number of other delegations reserved their position, noting the late stage of negotiations and the scope of the new proposal. One delegation called for further information on the submission.

On dispute settlement (part IX), delegates agreed to the text presented on: **prevention of disputes** (article 54 ante); **obligation to settle disputes by peaceful means** (article 54); **settlement of disputes by any peaceful means chosen by the Parties** (article 54 ter ante); and **disputes of a technical nature** (article 54 ter).

They then opened discussions on **procedures for the settlement of disputes** (article 55), containing two options. Option 1, which stipulates compulsory dispute settlement procedures, was supported by several delegations, with many welcoming its close links to UNCLOS Part XV (dispute settlement). A few delegations supported option 2, which contains text related to negotiation and conciliation of disputes. A few delegations did not support either option, with some noting that non-parties were not fully considered. Delegates will continue discussions in a small group on Wednesday.

In the Corridors

As delegates marched on to solve many of the now familiar points of divergence, others began to emerge on day 2 of the resumed meeting. In a creative bit of drafting – while many delegates struggled to find the proper and updated text proposal – one developing country tried to broaden the horizon of the future BBNJ agreement by linking it, not only with UNCLOS, but with the CBD. With the support of several other developing countries, the new text would broaden the objectives of the new agreement, including adding benefit-sharing to conservation and sustainable use. Not everyone was happy with this though, and unfortunately the developing-developed country fault lines were evident again. In this same vein, delegates broached their discussions on principles and approaches, where the common heritage of all humankind has now been put up against the freedom of the high seas in another unresolved round of fundamental discussions. “When will we ever get to the bottom of this?” one exasperated delegate was heard whispering. Some delegates reflected on the time spent on the repeated rehashing of long-standing positions, seeming to just reopen divides rather than build bridges, with some noting that it was time for a different negotiating approach. One seasoned observer was heard commenting: “If we treat every last round of negotiations like a first round, we will ever cross the finish line?”