

BBNJ IGC-5.2 Highlights: Thursday, 23 February 2023

Delegates attending 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 their work on Thursday, 23 February 2023. Delegates met in two parallel informal-informal consultations, in the morning and in the afternoon. They considered articles related to: area-based management tools (ABMTs), including marine protected areas (MPAs); environmental impact assessments (EIAs); and cross-cutting issues, specifically related to the general provisions of the new agreement. Delegates also met in small groups to address unresolved issues arising from the informal-informals and held consultations with IGC President Rena Lee.

Plenary

IGC President Rena Lee opened the session, inviting facilitators of informal-informals and small groups to report back on Wednesday's deliberations.

Facilitators reported on progress on ABMTs, including MPAs; EIAs; capacity building and the transfer of marine technology (CB&TT); institutional arrangements; and financial resources and mechanism. They highlighted provisions where delegates were able to reach consensus, noting the constructive spirit in the negotiations. They underscored, however, that more work and flexibility will be needed for a successful outcome, outlining future steps for the groups' deliberations.

The RUSSIAN FEDERATION underlined that the “mechanical” removal of brackets is not an indication of agreement, pointing to “serious disagreement” on the text.

Informal-Informal Discussions

General Provisions: Kurt Davis, Jamaica, facilitated the discussions. On **general principles and approaches** (article 5), the focus remained on the inclusion of the principle of common heritage of humankind, which was supported by many developing countries and groups, with one delegate pointing out that those in favor of the principle constitute four-fifths of humanity and others cautioning that if not included a core principle of the UN Convention on the Law of the Sea (UNCLOS) would be disregarded. Still many developed countries and one group opposed inclusion, with two indicating they could only consider its inclusion if counter-balanced by a reference to the freedom of the high seas. A few delegations suggested instead having a preambular reference as a compromise, which was rejected by those pointing to the importance of having it in the operative part. Many also rejected longer alternative formulations by an observer, with some warning against including entirely new text at this stage.

Most delegates supported including the following principles and approaches in the list: polluter pays principle; ecosystems approach; integrated approach; the use of the best available science and scientific information; the use of relevant traditional knowledge of Indigenous Peoples and local communities; and the non-transfer of damage or hazards from one area to another and the non-transformation of one type of pollution into another.

Many delegations supported the inclusion of the fair and equitable sharing of benefits, with some indicating that they could not accept the alternative reference to the principle of equity. While many delegations opposed the current formulation of the application of precaution, many indicated a preference for precautionary approach, with others favoring precautionary principle.

Regarding the reference to an approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity; one negotiating bloc asked to add “including the carbon cycling services that underpin the Ocean’s role in climate.”

On text regarding obligations relating to the rights of Indigenous Peoples and local communities relating to BBNJ, several delegations opposed a proposal to delete a reference to “obligations” and to refer to the “interests of” local communities as separate from the rights of Indigenous Peoples.

One delegation asked to change “full recognition” to “taking into account” the special circumstances of small island developing states, opposed by others, with a delegation asking to add a reference to landlocked developing countries.

Facilitator Davis encouraged small group discussions on this issue.

On **international cooperation** (article 6), many delegations agreed to the text noting that parties to the treaty shall promote international cooperation in marine scientific research and in the development and transfer of marine technology consistent with UNCLOS.

Delegates also addressed language calling on parties to cooperate with relevant international frameworks and bodies (IFBs) “and members thereof,” where points of divergence emerged. Some noted that cooperation between parties and non-parties will enhance implementation, while others noted that these IFBs are composed of many of the same member states, with some stating that the additional wording creates ambiguity. A few delegations highlighted that the language does not provide pragmatic ways of cooperating with existing IFBs.

In the same vein, opinions diverged on text noting that a party that is also a party to, member of, or participant in an IFB shall endeavor to promote the treaty’s objective in decision-making processes under other IFBs. Some proposed retaining the specific reference to the membership of IFBs, with several others opposing. One delegation, supported by a few, proposed that a party that “participates in” an IFB shall promote the treaty’s objectives, as appropriate. One group of states offered additional text to clarify that cooperation with other IFBs will include promoting “the consideration of decisions and recommendations made both under the BBNJ treaty and under other IFBs” as they relate to the conservation and sustainable use of marine biological diversity. In support, some noted that the language bolsters the relationship between the treaty and IFBs. A number of delegations called for more time to consider the new text, with some others noting that not all parties to the future instrument are members of other IFBs. Facilitator Davis called for informal consultations to make progress.

ABMTs, including MPAs: Renée Sauvé facilitated the session. Delegates heard the report from the small group on **decision-making** (article 19), where delegates were not able to find common ground.

During the session, delegates addressed a proposal for compromise text from the small group on the concept and implications of “recognition.” Several regional groups and delegations highlighted the concern related to the fact that the group is still working on the assumption that “recognition” is an accepted concept. One delegation highlighted that the fundamental problem was the need for recognition itself. There was a sharp divergence between those in support of the text as a basis for discussions, and those calling for deletion of the concept. Some supported the proposal that the first Conference of the Parties (COP-1) address this and decide on whether to develop a relevant process. Others cautioned against overloading the COP-1 agenda, with some noting that this could be done at subsequent COPs. Facilitator Sauvé encouraged further drafting towards compromise.

On **objection procedures** (article 19 bis), the delegation facilitating the small group discussions reported back on progress, stressing that the small group agreed that an objection launched by a party should be directed to the Secretariat rather than the COP, and noting divergent views on the grounds for objections.

On the grounds for objections, a few delegations expressed concerns about using “*inter alia*,” noting that the opt-out provision should be as restrictive as possible to maintain the treaty’s effectiveness. One delegate suggested restructuring and consolidating the provisions on the steps a party should take following the objection process, which will be further considered.

Some favored “adopting” measures rather than “taking” measures or actions. A delegation suggested, as a ground for objection, that “the decision is inconsistent with this agreement or rights and duties of the objecting party consistent with the Convention,” to address concerns of non-UNCLOS parties, which garnered some support. A regional group announced that they will be submitting textual suggestions for the entire article.

Two delegations reiterated their preference for consensus-based decision making, with one of them emphasizing that their proposal for a single provision under this article should be considered on an equal footing. Discussions will continue.

One delegate presented progress on discussions related to **emergency measures** (article 20 ante), reflecting Wednesday’s comments. The proposal clarifies that the COP shall take the decision, includes a possible reference to the application of precaution, and further explains the expiration of the measures, and the development of guidelines. The threshold remains in brackets.

EIAs: René Lefeber, the Netherlands, facilitated the session. He reported on progress made in the small group meeting on **objectives** (article 21 bis), **obligation to conduct EIAs** (article 22), and **thresholds and factors for conducting EIAs** (article 24.6), highlighting the need for further work. He noted substantive amendments to the provision on **the relationship between this agreement and EIA processes under other IFBs** (article 23), specifically related to guidelines and standards provisions. Delegates did not resolve text related to cases where conducting an EIA will not be necessary.

On the **EIA process** (article 30), Facilitator Lefeber noted that the text from the first part of IGC-5 was the basis of discussion. A delegate said that a number of provisions refer to the scientific and technical body, the establishment of which has not been agreed. Two delegations stressed that EIAs should be led and owned by states, including the screening process and potential decisions on not conducting an EIA, suggesting modifying the article accordingly.

On **screening**, delegates agreed to: add that it should be done in a timely manner; refer to a “determination” rather than a “decision” for clarity; include that a Party can register its views/concerns both with the Party making the determination and with the scientific and technical body; and refer to “relevant information to support the activity and the conclusion.” On a potential “calling” mechanism, opinions diverged on: whether to refer to “views” or “concerns,” that can be registered and may lead to reviewing the decision; and the timeframe for registering such views/concerns. A group of countries noted that they will be tabling a proposal for an extended “calling” mechanism.

On **scoping**, some delegates preferred to include the reference to social, economic, and cultural impacts in addition

to environmental ones. Others opposed, with one delegation indicating that including these would fall outside the treaty’s mandate as conferred by the UN General Assembly. Others suggested referring only to “impacts.” Some noted this would only be interpreted as environmental impacts, while others envisioned it more broadly to include at least associated social, economic, and cultural impacts. Facilitator Lefeber urged delegates to consult informally.

One delegation called to delete the language on **impact assessment and evaluation**, explaining that it infringes on national jurisdiction. On the provision related to the **roster of experts** to help parties with capacity restraints upon their request, one delegation suggested the addition of language aimed at avoiding potential conflicts of interest. A regional group proposed an amendment for the experts to assist in the conduct and evaluation of the screening and EIA. The options on whether decision making is up to the party, or the COP, remain in brackets.

On **public notification and consultation** (article 34), delegates disagreed on whether: the process should be targeted and proactive, where practicable, when involving adjacent small island developing states (SIDS); adjacent coastal states should be explicitly mentioned regarding the submission of comments; and the scientific and technical body may conduct, only once, further public consultation on reports it reviews under this agreement. Delegates agreed to delete a provision that additional guidance may be developed by the COP to facilitate consultation at the international level, with the understanding that it is covered in other parts of the agreement.

On the consultation process, a group of countries suggested a compromise solution, which would involve: adding that “in such cases where the planned activity is likely to affect areas within national jurisdiction, the party under whose jurisdiction or control the activity is intended to take place shall consider the relevant comments of the concerned states and provide written responses specifically addressing such comments, including regarding any additional measures meant to address those potential impacts”; and deleting a provision addressing cases where the planned activities affect areas of the high seas that are entirely surrounded by the exclusive economic zones of States. Delegates will further consider this suggestion. A delegate proposed that, in cases of cross-border impacts, the party that aims to conduct the activity should invite the affected party to a joint EIA.

Regarding **EIA reports** (article 35), two delegations expressed concerns regarding a provision that these reports shall be reviewed by the scientific and technical body, with one noting that this is addressed later in the text.

Following a brief exchange of views on the merits of multilingualism, discussions continued into the evening in English only. Delegates focused on **standards/guidelines/guidance to be developed by the scientific and technical body related to EIAs** (article 41 bis) and on **strategic environmental assessments** (article 41 ter).

In the Corridors

Thursday’s discussions were held over longer hours in different settings, taking up most of lunchtime and stretching into the evening. “We are certainly putting in the work to get us a treaty next week,” said one delegate, rushing into a closed-door discussion.

And indeed, delegates have their work cut out for them if they are to get “something akin to clean text” to review in the next few days. There are outstanding issues throughout the text, which will require different levels of compromise. Will the new treaty reflect the principle of common heritage of humankind? Who will benefit from the utilization of high-seas resources? How will the new treaty interact with existing bodies operating in the high seas? And finally, where will the resources to implement the treaty come from? As one facilitator said, “at this stage it is not about what you prefer, it is about what you can live with.”

One seasoned delegate, in a passionate plea during one of the sessions, underlined that “If we say that UNCLOS is the constitution of the ocean, then the Area is the common heritage of humankind.” Whether the requisite steps will be taken to implement this remains to be seen.