

## **Biodiversity Beyond National Jurisdiction Treaty Negotiations: Current Status & Outstanding Issues**

### **Introduction**

Since 2017, an Intergovernmental Conference convened by the United Nations General Assembly has been negotiating a new legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS)<sup>1</sup> on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). On August 26, 2022, despite widespread calls to complete the long-drawn negotiations,<sup>2</sup> the fifth session of the Conference (IGC-5) was suspended without the conclusion of a treaty.

The proposed BBNJ treaty addresses marine biodiversity in the deep seabed and high seas, which are largely unregulated under existing treaties. The high seas comprise most of the ocean's surface, serve as an important source of biodiversity, and supply a third of the world's oxygen.<sup>3</sup> As rising sea temperatures, ocean acidification, marine pollution, and overfishing pose serious threats,<sup>4</sup> stakeholders have described the BBNJ treaty as the UN's "once in a lifetime" chance to protect marine biodiversity.<sup>5</sup> Yet, despite early consensus on the need for the proposed treaty, five years of formal intergovernmental negotiations, and over seventeen years of consideration by the General Assembly,<sup>6</sup> states remain only "cautiously optimistic" about its conclusion.

This *Insight* contextualizes and analyzes recent developments in the BBNJ treaty negotiations during IGC-5. It does so by highlighting the progress made and remaining areas of disagreement concerning each of the five main aspects of the draft BBNJ treaty (hereinafter Draft Agreement): (1) marine genetic resources, including questions on the

sharing of benefits; (2) area-based management tools, including marine protected areas; (3) environmental impact assessments; (4) capacity-building and the transfer of marine technology; and (5) cross-cutting issues, including the establishment of a funding mechanism and dispute settlement.<sup>7</sup> It concludes by considering possible pathways for the adoption of the BBNJ treaty once IGC-5 resumes on February 20, 2023.

## **Marine Genetic Resources (MGRs)**

The Draft Agreement tentatively defines “marine genetic resources” as “any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value.”<sup>8</sup> This definition combines the definitions of “genetic material” and “genetic resources” found in the Convention on Biological Diversity, which does not cover genetic resources in areas beyond national jurisdiction.<sup>9</sup>

Recent advances in genetics and microbiology have increased interest in scientific research using MGRs in areas beyond national jurisdiction.<sup>10</sup> Given the potentially lucrative commercial applications, debates about MGRs have focused on “fair and equitable” access and benefit-sharing of MGRs, which many developing states do not have the financial or technical capacity to collect.

At IGC-5, delegations significantly narrowed the scope of their disagreements on benefit-sharing of MGRs. Notably, they generally aligned on definitions of key terms concerning the “access,” “collection,” and “utilization” of MGRs, which had evaded consensus as recently as IGC-4 in March 2022. For example, many delegations agreed that these definitions would reference “information” and “data” associated with MGRs, as favored by several developing states. Most delegations also agreed that projects involving the “collection of,” but not merely “access to,” MGRs were subject to notification requirements.

The main disagreements concerned whether benefit-sharing should cover monetary benefits, and if so, what payment rates and modalities should apply. Several delegations, including the United States and Japan, expressed concerns that monetary benefit-sharing might disincentivize scientific research, citing past experiences under the Nagoya Protocol.<sup>11</sup> Other (mainly developing state) delegations, including those in the G77 and China, asserted the need to include monetary benefit-sharing to “future-proof” the Draft Agreement. They underscored that, while few commercial products currently exist, more may be derived from MGRs in the future.

## **Area-Based Management Tools (ABMTs)**

The Draft Agreement defines ABMTs as “tool[s], including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed” to achieve goals of conservation and sustainable use.<sup>12</sup> Its ABMT section focuses on outlining the procedures for establishing, implementing, monitoring, and reviewing such tools.

At IGC-5, delegations came closer to finalizing the text of the ABMT section than any other section. Notably, they made substantial progress relating to draft Article 19 on the decision-making process of the Conference of Parties (COP) concerning the establishment of ABMTs. Delegations mostly aligned on a consensus rule for COP decisions with the possibility of a majority vote as a fallback.

When IGC-5 resumes, the unresolved questions concerning ABMTs will chiefly concern the role of the COP in relation to other international frameworks and bodies. Although delegations had generally agreed that COP decisions should not undermine the mandates of existing international frameworks and bodies, the precise formulations to characterize the relationship between COP decisions and those of other frameworks and bodies remain undecided. For example, delegations diverged on whether to use the terms “complementary” or “complementarity,” which appear but are undefined in a handful of multilateral treaties, such as the International Plant Protection Convention.

## **Environmental Impact Assessments (EIAs)**

Like many multilateral environmental agreements, the Draft Agreement addresses environmental impact assessments, which it defines as “a process to identify and evaluate the potential impacts of an activity to inform decision making.”

At IGC-5, delegations significantly streamlined the EIA section, which remains the longest and most detailed of the Draft Agreement. They also inched closer to consensus on long-debated issues, such as limiting the scope of activities triggering EIA obligations to “planned,” not “proposed,” activities, tracking Article 206 of UNCLOS. Yet major disagreements persisted about most of the EIA provisions, including the threshold, geographic scope, criteria, and processes for assessments.

A key disagreement concerns the threshold for EIAs. The Draft Agreement contains two main options. Option A.1 proposes a novel tiered approach, inspired by the Madrid Protocol on Environmental Protection to the Antarctic Treaty, which is potentially more

costly and burdensome for states.<sup>13</sup> This approach requires an initial screening for any activity that “may have an effect on the marine environment” and a full EIA when the screening shows that the planned activity “is likely to have a minor or transitory effect or greater on the marine environment or the effects are unknown or poorly understood.”<sup>14</sup> It proposes a state-led review process for activities deemed to have a “minor or transitory effect” and an internationalized review process for activities deemed likely to exceed that threshold. Option B mirrors the standard in Article 206 of UNCLOS, which would trigger an obligation to conduct an EIA, as far as practicable, only if relevant states have “reasonable grounds” to believe that the planned activity “may cause substantial pollution of or significant and harmful changes” on the marine environment.<sup>15</sup> Delegations favoring Option A.1, including those from the Caribbean and Africa, appreciated that preliminary screening allowed states to focus resources and internationalize the review of the most impactful activities. Conversely, delegations favoring Option B, which included the United States, China, and Japan, emphasized that the Antarctic Treaty system governed uniquely vulnerable marine areas and was therefore inapposite to most marine areas beyond national jurisdiction.

### **Capacity-Building and the Transfer of Marine Technology (CBTMT)**

The inclusion of a dedicated CBTMT section is a distinctive feature of the Draft Agreement. As with the ABMT section delegations at IGC-5 came close to finalizing the CBTMT provisions, which developing states consider essential to their ability to implement a prospective BBNJ Agreement.

Notably, delegations seemingly aligned on an overarching formulation that “[p]arties *shall cooperate*, . . . to assist Parties, in particular developing States Parties, in achieving the objectives of this Agreement through capacity-building and the development and transfer of marine technology.”<sup>16</sup> This represented a compromise for developing states that had pushed for stronger capacity-building obligations, such as the “shall *ensure*” language proposed by the G77 and China.

Most delegations also favored the establishment of a specialized CBTMT committee of experts to facilitate capacity-building and technology transfers—an innovation that has not yet featured in multilateral treaties.

### **Cross-Cutting Issues**

At IGC-5, delegations aligned on several cross-cutting issues, such as the modalities for the clearing-house mechanism to facilitate technical and scientific cooperation between

states. They left several others unresolved, including on financial mechanisms and dispute settlement.

While most delegations agreed to include a financial mechanism to assist developing states, no consensus emerged on the modalities. Many developing states called for mandatory funding provisions, but other delegations remained firmly opposed and supported only voluntary contributions, such as through a trust fund. The Draft Agreement thus reflects arguably weaker obligations than those found in recent multilateral environmental agreements such as the Convention on Biological Diversity and the Paris Agreement, both of which guarantee some financial assistance for developing states.

On dispute settlement, no consensus emerged on a proposal to allow the COP to request advisory opinions from the International Tribunal for the Law of the Sea on legal questions within the scope of the Agreement. While the proposal was included in the latest Draft Agreement, states remained divided. Some delegations underlined the potential benefits of advisory opinions in preventing disputes and clarifying issues that may arise in the future. Other delegations raised concerns about the scope of advisory opinions, highlighting the risk that they could be abused to decide contentious matters outside the scope of the Agreement.

## **Conclusion**

To conclude a treaty when IGC-5 resumes, delegations must resolve several key disagreements, particularly those concerning the MGR and EIA sections. UN General Assembly Resolution 72/249, which initiated the intergovernmental negotiations, requires delegations to “exhaust every effort” to reach consensus but, failing that, permits adoption of a text by a two-thirds majority vote.<sup>17</sup> State delegations have rightly stressed the importance of universal participation to ensure the effectiveness of the prospective BBNJ Agreement. As the treaty-making process potentially draws to a close, they face a difficult choice between compromising on thorny issues and jeopardizing universal participation.

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- <sup>1</sup> Dec. 10, 1982, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en).
- <sup>2</sup> See, e.g., U.N. Ocean Conference, [https://sdgs.un.org/sites/default/files/2022-06/UNOC\\_political\\_declaration\\_final.pdf](https://sdgs.un.org/sites/default/files/2022-06/UNOC_political_declaration_final.pdf).
- <sup>3</sup> U.N. Secretary-General, *Oceans and the law of the sea*, ¶ 1, U.N. Doc. A/60/63/Add. 1 (July 15, 2005).
- <sup>4</sup> U.N. Secretary-General, *Our ocean, our future, our responsibility: draft declaration*, ¶ 4, U.N. Doc. A/CONF.230/2022/12 (June 17, 2022).
- <sup>5</sup> Karen McVeigh, *UN Ocean Treaty Is 'Once in a Lifetime' Chance to Protect the High Seas*, THE GUARDIAN (Mar. 10, 2022), <https://www.theguardian.com/environment/2022/mar/10/un-ocean-treaty-is-once-in-a-lifetime-chance-to-protect-the-high-seas>.
- <sup>6</sup> G.A. Res. 59/24, ¶ 73 (Feb. 4, 2005) (establishing an Ad Hoc Open-ended Informal Working group tasked with mapping out issues relating to BBNJ).
- <sup>7</sup> In preparation for IGC-5, a “Further revised draft” of the Agreement was published on the IGC-5 website on June 1, 2022. See Further revised draft text of an 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, U.N. Doc. A/CONF.232/2022/5 (June 1, 2022). The President of IGC-5 circulated a “Further refreshed draft” of the Agreement on August 26, 2022, but that draft has not yet been published on the IGC-5 website. All direct quotations to the Draft Agreement in this *Insight* are from the June 1, 2022 draft. Other references to the current draft are to the August 26, 2022 draft.
- <sup>8</sup> Draft Agreement, art. 1(11) (Option B) (reflecting the definition favored by most delegations during IGC-5).
- <sup>9</sup> U.N. Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 143, arts. 2, 4.
- <sup>10</sup> A/60/63/Add. 1, *supra* note 3, at ¶¶ 6, 41–42; see also Marjo K. Vierros et al., *Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources*, LIMNOLOGY AND OCEANOGRAPHY BULL. 2 (2016), [https://www.researchgate.net/profile/Curtis-Suttle/publication/301609384\\_Who\\_Owns\\_the\\_Ocean\\_Policy\\_Issues\\_Surrounding\\_Marine\\_Genetic\\_Resources/links/59e2ed8e0f7e9b97f9c4b7/Who-Owns-the-Ocean-Policy-Issues-Surrounding-Marine-Genetic-Resources.pdf](https://www.researchgate.net/profile/Curtis-Suttle/publication/301609384_Who_Owns_the_Ocean_Policy_Issues_Surrounding_Marine_Genetic_Resources/links/59e2ed8e0f7e9b97f9c4b7/Who-Owns-the-Ocean-Policy-Issues-Surrounding-Marine-Genetic-Resources.pdf).
- <sup>11</sup> See Conf. of the Parties to the Convention on Biological Diversity, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, Annex I, UNEP/CBD/COP/DEC/X/1 (Oct 29, 2010), art. 5(4).
- <sup>12</sup> Draft Agreement, art. 1(3) (Option B) (reflecting the definition favored by most delegations during IGC-5).
- <sup>13</sup> U.N. Protocol on Environmental Protection to the Antarctic Treaty, Jan. 14, 1998, 2941 U.N.T.S. 9, Annex I.
- <sup>14</sup> Draft Agreement, art. 24(1) (Option A.1).
- <sup>15</sup> *Id.*, art. 24(1) (Option B).
- <sup>16</sup> *Id.*, art. 43(1) (emphasis added)
- <sup>17</sup> G.A. Res. 72/249, ¶¶ 17, 19 (Jan. 19, 2018).