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Bringing the ship to shore: Significant progress towards a high seas biodiversity treaty

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Biodiversity in marine areas beyond national jurisdiction (BBNJ) is increasingly threatened by human activities and the accelerating impacts of climate change, yet the [international legal framework](#) for conservation and sustainable use is fragmented, incomplete and uncoordinated. A plethora of regional and sectoral bodies provide only limited protection and have proven insufficient to protect against biodiversity loss, overfishing and pollution. From 15-26 August 2022, States met at the United Nations for the fifth session of an [intergovernmental conference](#) (IGC) to negotiate a new treaty¹. After 15 years of discussion, this was supposed to be the final session of the IGC, ending with the adoption of an agreement. While some non-governmental organisations (NGOs) felt the [meeting was a failure](#), many negotiators and observers nonetheless left New York convinced that an agreement is on the horizon.

What progress was made?

The atmosphere was positive and the vast majority of States negotiated in good faith, with delegations showing much more flexibility and few actively seeking to block progress. Following high-level calls to finalise the treaty made at the second UN Oceans Conference (Lisbon, June 2022), political instructions were given and negotiators had done their homework. They met in “informal informals” and small groups, collaborated to make cross-regional proposals, and engaged in private consultations with the President of the IGC, Rena Lee (Singapore), in an effort to develop “high-level package compromises”.

The long days of discussion resulted in significant progress toward consensus and compromise on some key issues, but delegates ran out of time and were unable to deliver the clean text needed to negotiate the final trade-offs. The President will now request the UNGA schedule a resumed conference.

Marine genetic resources

The legal status of MGRs, which can be used to develop valuable pharmaceuticals and other products, has always been a defining tension in the negotiations—in particular regarding whether and how the benefits arising from their exploitation should be shared. Developed countries with the capacity to conduct research and development argue that these resources can be freely accessed and exploited as part of the “freedom of the high seas” enshrined in UNCLOS.

Developing States argue that MGRs are part of the “Common Heritage of Mankind” (CHM) and that the benefits should be shared with all.

Discussion of CHM at IGC5 quickly resulted in reversion to these familiar dynamics: as some dismissed the relevance of CHM, others cited UNCLOS and UN resolutions dating back to the 1970s in support of their claim. The current draft includes CHM in the list of overarching principles that the Agreement is to be “guided by”, though this remains in brackets.

Negotiators nonetheless appeared close to finally breaking the deadlock, with many key developed States now expressing willingness to entertain [some form of monetary benefit-sharing](#). Different proposals were advanced, with some support for both a flat-rate access fee and a royalty-like payment system. One delegation proposed mandatory payments for capacity building instead, though this attracted little support. A proposal to leave it to the future Conference of the Parties (COP) to develop the modalities also failed to attract consensus.

Despite making progress in principle, patience began to wear thin towards the end of the meeting and developing States continue to feel that further concessions are warranted.

Environmental impact assessment

The EIAs section was subject to intense debate and many small groups were formed in an attempt to advance specific textual proposals. Delegates resolved a long-standing disagreement on whether the provisions should apply to “planned” or “proposed” activities (settling on “planned”). Many delegations supported inclusion of [strategic environmental assessments](#) (SEAs), which would provide a collaborative process for understanding marine ecosystems, developing scientific knowledge, and managing cumulative impacts, though there was little agreement on the definition or modalities.

Consensus continued to prove elusive on many key issues, including: definitions; the threshold for conducting an assessment; whether EIA should be impact- or activity-based; the role of a future Scientific and Technical body (STB); and decision-making (including the powers of the COP over EIAs conducted by parties).

Many developed States, including EU members, continue to insist on light provisions that would provide limited international oversight and input from the STB; whereas the G77 argues in favour of a more internationalised process. Along similar lines, negotiators remain divided over whether the BBNJ Agreement should develop global minimum standards or non-binding guidelines for EIAs conducted under existing bodies.

Management measures and protected areas

Significant progress was made on area-based management tools/marine protected areas (ABMTs/MPAs). Delegates streamlined the section and approached consensus on many key provisions, including preparation/review of proposals and decision making. The current draft would aim for the “establishment of a comprehensive system” of ABMTs, including an “ecologically representative and well-connected network” of MPAs. It would give the COP a mandate to: adopt measures; formally recognise measures adopted under other frameworks (thus extending their applicability to Parties to the BBNJ Agreement); and make recommendations to existing bodies (or members thereof).

Importantly, the current draft envisages a majority voting mechanism for the adoption of measures where consensus cannot be reached, which should discourage Parties from stifling progress. Negotiators also advanced the section on emergency measures, though the current text would leave the details to the STB.

The relationship to existing bodies, such as regional fisheries management organisations (RFMOs) and Regional Seas programmes, remains amongst the most controversial issues. Some delegations, seeking a positive approach to the “not undermining” requirement, have proposed language on “complementarity”; others have argued for a narrower interpretation that would only give the COP a mandate where no other organisations exist.

Capacity building

In general, the discussion of capacity building and the transfer of marine technology (CBTT) has been less polarising, though once again developing States want to see more ambitious commitments while developed States have tended to avoid strong provisions and obligations. Delegates appeared to approach consensus on the establishment of a dedicated CBTT committee, as well as on provisions for monitoring and review.

Some regional groups called to “ensure” CBTT for developing states, while others preferred to use UNCLOS language of “promoting”. Negotiators have vacillated on whether to include a list of CBTT activities: many delegations support the listing of some activities in the text, as well as reintroducing an Annex containing an indicative, non-exhaustive list of CBTT activities (thus it would form part of the Agreement and could be periodically reviewed and amended); however, others wish to leave the development of a list to the COP and/or the CBTT committee.

Other elements

On **principles and approaches**, negotiators struggled to agree on whether the precautionary principle is a principle or an approach, while an alternative wording—“application of precaution”—failed to attract support. The principle of stewardship is now crossed out in the current draft.

Two options are on the table for **implementation and compliance**: one allows the COP to adopt mechanisms to promote compliance but would leave it to parties to ensure and monitor implementation; the other takes a more comprehensive approach by establishing a dedicated [implementation and compliance committee](#) (as is common in multilateral environmental agreements)

Regarding **institutional arrangements**, negotiators did not reach agreement on the arrangements for a **secretariat**, with some preferring to establish a dedicated secretariat and others arguing that the Agreement could be housed under existing UN mechanisms. Concerning **funding**, a large number of States favour the inclusion of distinct provisions for institutional and non-institutional funding, insisting that adequate financial resources for CBTT and other areas will require mandatory contributions. There appeared to be some momentum for establishing of a dedicated finance committee. There continues to be broad consensus on the establishment of a **clearing-house mechanism**, whose diverse functions would be further specified by the COP.

Another struggle over the global commons

The defining issues in the BBNJ negotiations, and the tension between environmental protection (MPAs & EIAs) and equity (MGRs & CBTT), reflect longstanding dynamics in multilateral environmental negotiations. Long disadvantaged by structural inequality and buffeted by successive crises, developing countries are increasingly vocal in highlighting the need for justice issue and calling on the global North to fulfil financial pledges.

While these issues have often proved intractable in the climate and biodiversity negotiations, there appears to be an opportunity to bridge these divides in the BBNJ treaty. In this regard, these negotiations represent a positive counterpoint to pessimism regarding the state of multilateralism (alongside advances toward a WHO pandemics treaty; discussion of vaccines at the WTO; negotiations on a science-policy interface for chemical pollution; and a treaty on plastics).

Bringing the ship to shore

As IGC5 opened with a standing-room-only plenary, President Rena Lee urged negotiators to “bring this ship into the shore!” While negotiators ultimately ran out of time, long-time participants in the process nonetheless remained upbeat, noting the substantial progress made on key issues and the need to prioritise a robust treaty over a speedy conclusion. Delegates will need to continue to show flexibility in order to find common ground and consensus and, as **one delegate noted**, the resumed conference will need “creative ideas and considerable compromises” to finalise the treaty.

¹ The negotiations cover a package of four issues: (1) ensuring conservation and sustainable use of BBNJ through the use of area-based management tools (ABMTs) and marine protected areas (MPAs); (2) improving environmental impact assessments (EIAs) of human activities in the high seas, including by developing standards or guidelines and accounting for cumulative impacts; (3) advancing capacity building and the transfer of marine technology (CBTT) to enable all States to participate; and (4) providing a governance framework for marine genetic resources (MGRs), in particular by regulating access and ensuring that the benefits resulting from their exploitation are shared.

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