



COMMISSION OF SMALL-SCALE, ARTISANAL FISHERIES AND AQUACULTURE OF LATIN AMERICA AND THE CARIBBEAN

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FAO AND MARINE AREAS BEYOND NATIONAL JURISDICTION (ABNJ)

Introduction

Marine areas beyond national jurisdiction (ABNJ) account for 64 percent of the total ocean's surface and about half of the planet's surface. The sustainable use of fisheries resources in areas beyond national jurisdiction cannot be achieved without the conservation of biodiversity. In accordance with United Nations General Assembly (UNGA) Resolution 69/292 of 19 June 2015, negotiations are under way for a new international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ). In its Resolution 72/249 of 24 December 2017, the UNGA decided to convene an intergovernmental conference (IGC) that will meet in four sessions.

The Intergovernmental Conference and participation of FAO in the BBNJ process

The intergovernmental conference on an international legally binding instrument under UNCLOS for the conservation and sustainable use of biodiversity beyond national jurisdiction is being convened to consider the recommendations of the Preparatory Committee established pursuant to Assembly resolution 69/292 on the elements and text of such an instrument, with a view to developing it as soon as possible (resolution 72/249, para. 1).

The negotiations will address the issues identified by the Preparatory Committee agreed in 2011 (the 'package') namely the conservation and sustainable use of marine biological diversity from areas beyond national jurisdiction, in particular, marine genetic resources (MGR), including questions on benefit sharing, measures such as area-based management tools (ABMT), including marine protected areas (MPA), environmental impact assessments (EIA) and capacity building and transfer of marine technology (CBTMT).

The work and outcomes of the IGC must be fully consistent with UNCLOS provisions, and the process and outcome must not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies as indicated in the UNGA Resolution (A/RES/72/249 paragraphs 6 and 7).

To minimise the impact of FAO's working methods on the environment and to contribute to climate neutrality, a limited number of copies of this document have been issued. Delegates and observers are kindly requested to bring their copies to meetings and to refrain from requesting additional copies. Most FAO meeting documents can be consulted at www.fao.org

As part of the process of developing the draft zero in the first substantive session of the intergovernmental conference, held from 4 to 17 September 2018, delegations discussed the issues identified in the package agreed on in 2011 and some cross-cutting issues on the basis of the chair's assistance to the discussions (A/CONF.232/2018/3¹), bearing in mind the recommendations relating to sections III.A and B of the Preparatory Committee report (A/AC.287/2017/ PC.4/2²) and taking into account other materials produced in the context of the Preparatory Committee. At the second session of the conference, held from 25 March to 5 April 2019, delegations again engaged in discussions based on the ideas and proposals stemming from the chairman negotiations (A/CONF.232/2019/1³), to facilitate text-based negotiations and included the language of the treaty and options relating to the four elements of the package and some cross-cutting issues. During the third session of the conference, held from 19 to 30 August 2019, delegations discussed the draft text of an agreement under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, which had been prepared by the chair of the conference (A/CONF.232/2019/6⁴). At the fourth session of the conference, held from 7 to 18 March 2022, delegations discussed a revised draft text of an agreement prepared by the chairman of the conference (A/CONF.232/2020/3⁵). At the end of the fourth session, the President was requested to prepare a further revised draft of an agreement, taking into account the work done during the fourth session period, with a view to facilitating the completion of the work of the conference. The revised draft would also take into account proposals from delegations included in various documents issued during the fourth session and other proposals sent to the secretariat prior to 31 March 2022.

Given the implications that this process could have on the fisheries sector, and as instructed by COFI, FAO attended and contributed to the four IGC sessions to provide relevant technical information on issues related to FAO's mandate. Regardless of how the BBNJ process evolves, the instrument will be relevant to high sea fisheries. For example, area-based management tools and environmental impact assessments, two main elements of the discussion package, will undoubtedly influence fishing activities in marine areas beyond national jurisdiction (ABNJ). Yet, UNGA Resolution 69/292 clearly mentions that the new agreement must not undermine existing instruments, frameworks and bodies, including RFMOs and their mandates.

Current status of the BBNJ process

Negotiations at the 4th UN BBNJ Conference focused on the four main blocks of the international draft provisions (i.e. MGR, EIA, ABMT, CBTMT and cross-cutting issues) and were organised in two complementary formats: plenary and informal meetings aimed at identifying a general direction towards reaching consensus on some of the highlighted topics in the text.

Delegations engaged in extensive discussions on a number of outstanding issues. Unlike the three previous sessions of the UN BBNJ IGC, for the first time tangible progress was made in the actual negotiation of the various provisions contained in the draft of the international instrument, as delegations engaged in a thorough analysis of all articles on the basis of a

¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/197/15/PDF/N1819715.pdf?OpenElement>

² <https://digitallibrary.un.org/record/1306977?ln=en>

³ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/413/20/PDF/N1841320.pdf?OpenElement>

⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/146/28/PDF/N1914628.pdf?OpenElement>

⁵ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/372/88/PDF/N1937288.pdf?OpenElement>

compilation of comments that had been submitted to the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) in recent months. Still, as negotiations progressed, it became clear that the heavy format of the draft, with a lot of bracketed text and containing alternative proposals in the same paragraphs, posed significant challenges and hindered the emergence of a clear consensus on the four main blocks of provisions addressed by the 4th UN BBNJ Conference. More specifically:

- **On capacity building and transfer of marine technology:** the main consideration raised concerned the voluntary or mandatory nature of the mechanism allowing for these interventions under the future international agreement, on which no compromise was reached and although most seemed to understand that capacity building should be mandatory, marine technology transfer should remain voluntary. Similarly, opinions diverged on whether these interventions should be triggered under the new international agreement on mutually agreed terms or on fair and more favourable terms. Other issues addressed during the 4th UN BBNJ Conference included the types of capacity building and transfer of marine technology, their follow-up and review, and their specific objectives. Overall, many of the issues raised did not seem insurmountable. The critical question of whether the provision of capacity building and transfer of marine technology should be mandatory or voluntary may also benefit from some reconsideration once other aspects of the text have been discussed.
- **On marine genetic resources, including questions on benefit-sharing (MGR):** Most of the negotiations focused on provisions related to collection and access to MGRs in areas beyond national jurisdiction. Despite the effort to show flexibility, delegations did not move much from their positions, particularly in relation to fair and equitable benefit sharing. The mandatory versus voluntary nature of the benefit-sharing regime, and whether the benefit-sharing would be monetary or non-monetary, remained contentious issues of little coverage. Regarding the physical coverage, there was broad consensus among the delegations that the relevant provisions of the text should not apply to fish and other biological resources as commodities. On the whole, and despite several outstanding issues, there is a common desire to build a structure that will result in the distribution of benefits in a fair and equitable manner. There was general consensus regarding the establishment of a notification system and an understanding that the sharing of at least certain benefits should be mandatory.
- **On area-based management tools (ABMTs), including marine protected areas (MPA):** the delegations paid due consideration to the identification of areas requiring protection while discussing the general guiding principles, the need for an annex containing indicative criteria for identifying these areas and whether such criteria would be applicable to existing institutions (including RFMO). There was some tangible progress regarding some of the guiding principles, in particular, the designation of ABMT. Thus, the position of those (Japan, G77, EU, Iceland, Russian Federation, among many) against revising the mandate and role of RFMO gained momentum. This would imply that no regional instruments/organisations would be established under the future international agreement that could somehow compete with the RFMO. In fact, the RFMO would contribute to addressing ABMT, streamlining their implementation, as they would be considered as part of the category of relevant global, regional, sub-regional and sectoral bodies (RFB) recognised by the decision-making mechanism that will be introduced by the future international agreement. There was a natural consensus that such a mechanism would prompt decisions by the Conference of the Parties (COP) about the future international agreement on ABMT only where there was no IFB, or if any, it had no conservation objectives. In keeping with the same, the 'no undermining' clause was mentioned once and again when commenting on the relationship between the future international agreement and existing IFB, including RFMO. In the same vein, the relationship between the COP of the future international agreement and the governing bodies of existing IFB was extensively discussed in terms of mutual support. A variety of views were expressed on the relevant roles of the COP vis-à-vis the relevant IFBs and this will probably require further discussion in the context of the cross-

cutting issues. Delegations felt it was important that the agreement would not create a hierarchy in the international legal framework for the oceans, or a 'one size fits all' approach, but would create a global platform for enhanced coherence and cooperation. With regard to the decision-making modalities of COPs, further discussions will be needed, including cross-cutting issues.

- **On environmental impact assessments (EIA):** the discussion focused on the provisions of the revised draft related to the execution of the EIA, internationalisation of the EIA process, the relation between the agreement and EIA processes under other relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies, strategic environmental impact assessments, decision making and follow-up, reporting and review. An inter-regional proposal related to the execution of the EIA was presented which provides a tiered approach based on the threshold of 'likelihood of minor or transient effects' in combination with elements of internationalisation. Some delegations supported this approach, but it was pointed out that it should include the 'substantial contamination or significant and harmful changes' threshold contained in article 206 of UNCLOS, second tier, and state-driven decision making. Other delegations argued that it would be preferable to develop a robust and transparent process using a single threshold based on Article 206. Ultimately, the viable solutions identified should take into account the capacity of States Parties to conduct EIAs, as well as the responsibility of the international community for the governance of areas beyond the limits of national jurisdiction. Delegations strongly supported the idea that the threshold should be the focus of discussions on the execution, rather than a list of activities that do or do not require an EIA. While delegations attached great importance to marine areas identified as ecologically or biologically significant (EBSAs) or vulnerable in the EIA process, there was no consensus on the need for a separate provision for such areas. The delegations highlighted a variety of ways in which the EIA process could be 'internationalised', including the establishment of a robust and transparent EIA process and the assignment of roles to bodies to be established under the agreement. In this context, it was noted that there are multiple reasons for such internationalisation, in particular (1) capacity, (2) accountability and (3) transparency. There was strong support for the Scientific and Technical Body (STB) of the future international agreement to consult and/or coordinate with relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies with the mandate to regulate activities in areas beyond national jurisdiction or to protect the marine environment. In terms of the relation between the agreement and the environmental impact assessment processes under other relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies, there was significant agreement on the requirement to consult and/or coordinate or cooperate with relevant legal bodies and global, regional, sub-regional and sectoral instruments and frameworks and bodies. However, there were persistent differences on whether the COP or relevant global, regional, sub-regional or sectoral bodies would have the authority to establish/designate ABMTs, including MPAs, by adopting conservation and/sustainable use/management measures to complement those of other bodies, or only where such bodies and related measures do not exist. As regards strategic environmental assessments (SEAs), there was broad support for addressing SEAs in the agreement, with some preference for a substantive provision regarding the SEAs rather than just an enabling one. Differences remained on whether such a provision should be mandatory or voluntary. There were different opinions with regard to whether States Parties or COPs should decide if an activity could continue. There was general support for a provision about reporting, although there were different opinions on the modalities of reporting and support towards reporting through sharing information. There was also disagreement on whether there should be special consideration for adjacent riparian States in monitoring, reporting and review.
- **On cross-cutting issues:** delegations discussed the provisions of the revised draft of an agreement related to institutional arrangements, in particular the role of the COPs, a scientific and technical body (STB), a secretariat and a clearing-house mechanism, and provisions on financing, implementation and compliance, dispute settlement and use of terms. There was broad support for the establishment of a COP as the decision-making body under the agreement.

There were different views on the modalities for decision-making by COPs. Proposals included voting modalities after all efforts to reach consensus had been exhausted, to decisions to be taken exclusively by consensus and with different decision-making modalities or an 'opt-out' process with respect to area-based management tools, including marine protected areas. It seemed to be a general understanding that the STS would have advisory roles and operate under the guidance and authority of the COP. Further discussion will be needed on whether a new secretariat should be established or whether the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs (DOALOS) should act as the secretariat, with appropriate structure and resources, or whether the COPs should designate the secretariat. There was consensus regarding the crucial role of the clearing-house mechanism to facilitate the effective implementation of the agreement and its management by the secretariat, with suggestions, though, to have some flexibility in the allocation of some functions or to partner with other bodies. There were also preferences regarding the administration of the mechanism by UNESCO/IOC or for the COPs to decide on this issue. With regard to funding, there were discussions on the use of the Global Environment Facility as the core financial mechanism that provides funding in line with the priorities set by the COP, and different views were expressed about it. In general, the delegations supported the provision on implementation and compliance, with the need for further refinement of the text. Reservations were expressed regarding the role of the COP in addressing non-compliance, including the need to avoid negative language around the term 'non-compliance'. Different views were expressed with regard to the article on dispute settlement, and whether to apply Part XV of the Convention *mutatis mutandis* or to develop agreement-specific dispute settlement mechanisms and more work will have to be done, in order to accommodate the different concerns of UNCLOS parties and non-parties. It was noted that the International Tribunal for the Law of the Sea (ITLOS) could provide a cost-effective default procedure. Interest was expressed in a joint proposal to include a provision that would allow States Parties to jointly submit disputes of a technical nature to an ad hoc panel of experts, with references to a model in the UN Fish Stocks Agreement.

Current status of BBNJ negotiations: ongoing fifth session of the IGC

The fifth session of the conference convened from 15 to 26 August 2022. Despite high expectations, the IGC-5 did not finalise negotiations on the new global high seas treaty. Despite the earnest and dedicated efforts of delegates, divergences remained after two intense weeks of negotiation. As the Conference drew to a close, it became increasingly clear that, despite considerable progress, delegates were running out of time. The IGC Chair adjourned the Conference which resumed from 20 February to 3 March 2023 with the ultimate goal of finalising this long-awaited international instrument.

As requested by COFI, even at its last session in September 2022, FAO will maintain its involvement in the BBNJ process and, as part of the mandate and area of competence of the Organisation, will continue to provide technical advice and relevant information to support the negotiation.