

BBNJ IGC-3 Highlights: Wednesday, 21 August 2019

The third session of the Intergovernmental Conference (IGC) on an international legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) met on Wednesday, 21 August 2019, in two closed-door “informal-informals” to discuss: aspects of environmental impact assessments (EIAs) related to decision making and relationships with other instruments; and aspects of marine genetic resources (MGRs) related to access. Delegates also met in an informal working group on area-based management tools (ABMTs), including marine protected areas (MPAs).

Report from Closed Informal-Informals

ABMTs, including MPAs: Facilitator Alice Revell (New Zealand) summarized Tuesday’s informal-informal discussion on international cooperation and coordination (Article 15) and decision making (Article 19). She highlighted that delegates had discussed ideas related to definitions of ABMTs, including MPAs, reflecting the general understanding that ABMTs are a broader concept, which includes MPAs. Among others, she noted agreement to include a definition of ABMTs that does not exclude MPAs. She highlighted divergent views on the definition of MPAs, including references to them as tools to achieve long-term biodiversity conservation and sustainable use.

On Article 15, Revell noted the link to objectives of ABMTs (Article 14) and decision making, highlighting continued discussions of different aspects, such as: when an ABMT is established in areas where there are relevant existing instruments, frameworks, and bodies in place; when a tool is proposed in an area where no other instruments exist; and on the cooperation and coordination of relevant “existing” instruments, frameworks, and bodies.

She further summarized: support for deleting reference to “existing” relevant legal instruments, frameworks, and bodies; and preference for “establishing” over “designating” ABMTs, noting proposals for new terminology yet to be considered.

Informal Working Group

ABMTs, including MPAs: Identification of Areas requiring protection: On the title, CANADA, the PHILIPPINES, and JAPAN preferred deleting the reference to areas “requiring protection.” The REPUBLIC OF KOREA underlined that the principle of “not undermining” applies to Articles 16-19 (identification of areas, proposals, consultation, and decision making related to ABMTs). CANADA noted that references to best available science, ecosystem approach, and precaution should apply to the agreement as a whole, and further proposing defining ABMTs, including MPAs, as well as other effective conservation measures (OECMs).

Basis for ABMTs: The G77/CHINA, with the AFRICAN GROUP, JAPAN, CUBA, BANGLADESH, AUSTRALIA, SENEGAL, MAURITIUS, THAILAND, CANADA, and others,

expressed support for the establishment, rather than designation of ABMTs. TURKEY suggested establishing ABMTs, and designating MPAs.

The G-77/CHINA, the EU, the AFRICAN GROUP, CUBA, the PHILIPPINES, SWITZERLAND, P-SIDS, NORWAY, HIGH SEAS ALLIANCE, and IUCN expressed preference for the precautionary principle.

JAPAN, with the REPUBLIC OF KOREA, CHINA, CANADA, TURKEY, AUSTRALIA, and the US, supported the precautionary approach. The US noted that the concept of the precautionary principle gives rise to a particular legal conclusion.

The RUSSIAN FEDERATION emphasized best available scientific data and the “precautionary ecosystem approach,” and said that measures should be time-bound and adjustable to allow for strengthening, weakening, or lifting restrictions.

The EU and the US expressed a preference for “the ecosystem approach”; with the EU emphasizing the importance of taking into account relevant traditional knowledge. P-SIDS, with CARICOM and ERITREA, noted that traditional knowledge should be reflected in the ILBI as equal to best available science. CHINA emphasized best scientific evidence, and noted that persons and entities, including member states, other than indigenous peoples and local communities (IPLCs), may be the holders of traditional knowledge. P-SIDS emphasized that language on traditional knowledge needs to reflect existing international law.

List of ABMT criteria: JAPAN, the US, the PHILIPPINES, KIRIBATI, the HIGH SEAS ALLIANCE, and SINGAPORE supported streamlining the list, with the US calling for a flexible list. AUSTRALIA, MALDIVES, and SENEGAL called for the development of a non-exhaustive list.

The G-77/CHINA supported an indicative list of identification criteria including: slow recovery “and resilience,” with BANGLADESH and Costa Rica, for the LIKE-MINDED LATIN AMERICAN COUNTRIES; but deleting reference to rarity, biological productivity, exceptional naturalness, economic and social factors, the adverse impacts of climate change and ocean acidification, and cumulative and transboundary impacts. The EU called for deleting references to dependency, economic and social factors, and feasibility, questioning how these criteria serve the identification of areas. P-SIDS called for referring to uniqueness “or” rarity; proposed to add cultural factors to the list; and emphasized the importance of referring to both climate change and ocean acidification. The PHILIPPINES supported uniqueness, biological productivity and, with SINGAPORE, deleting “exceptional” as a descriptor of naturalness, and deleting ecological connectivity. NEW ZEALAND, supported by ERITREA, proposed adding cultural connectivity and cultural value to ecological connectivity.

The AFRICAN GROUP proposed a streamlined categorization of criteria: vulnerability to impacts, including from climate change, ocean acidification, anthropogenic ocean noise pollution, and other cumulative effects; essential for the survival, function, or recovery

of rare depleted, threatened, or endangered marine species and other forms of marine life; natural carbon stores; and enhancing productivity and health, and building resilience to stressors, including those related to climate change, ocean acidification, and marine pollution. CHINA, with CUBA, suggested the criteria be separated into four categories, reflecting economic, social, biological and ecological, and operational criteria.

NORWAY queried how the list of the criteria will be operationalized in the new treaty, cautioning that “we may end up with every part of the ocean requiring special treatment.” He further queried the difference between criteria on “vulnerability,” “fragility,” and “sensitivity.”

IUCN proposed differentiating criteria for the evaluation of individual sites and those for networks of sites, noting that different criteria might be important for MPAs and requesting explicit reference to de-oxygenation.

ERITREA further underscored the importance of socioeconomic factors and, with CUBA, proposed including reference to the Sustainable Development Goals (SDGs). SWITZERLAND, with JAPAN and the US, noted links to work under other bodies and organizations.

JAPAN, with the US, felt climate change was adequately covered by vulnerability, fragility, sensitivity, and slow recovery, while SWITZERLAND and SINGAPORE proposed combining vulnerability and ocean acidification. NEW ZEALAND preferred referencing vulnerability to climate change and its effects. THAILAND underscored the importance of including climate change and ocean acidification in the description of vulnerability.

CARICOM proposed restructuring the article to ensure a focus on conservation and sustainable use, and broaden the areas that could be subject to ABMTs. She suggested, supported by the EU, THAILAND, SENEGAL, and the PHILIPPINES, that criteria be placed in an annex with a general provision in the treaty to provide guidance on criteria identification, suggesting that a scientific and technical body be tasked with developing and revising criteria over time, building on lessons learned from other bodies. NEW ZEALAND expressed flexibility regarding an annex. JAPAN suggested that detailed criteria be outlined in guidelines.

The EU, supported by P-SIDS, proposed to also use the list of criteria in the recognition of existing MPAs designated by relevant bodies.

On the mechanism for establishing ABMTs, the RUSSIAN FEDERATION noted decisions should take place within competent regional bodies, stressing that the article should describe a general approach for areas requiring “attention” rather than protection; and questioned the rationale for the list of criteria, asking whether they are to be seen in an alternative or cumulative manner, expressing flexibility to an indicative list in an annex.

Development of criteria: The G-77/CHINA, with the AFRICAN GROUP, indicated that criteria could be further developed by the scientific and technical body, for consideration and adoption by the Conference of the Parties (COP), supported by P-SIDS. AUSTRALIA questioned the appropriateness of the COP revising criteria contained in the treaty text. TURKEY, with the REPUBLIC OF KOREA, proposed that a scientific and technical body determine the list of criteria.

THAILAND and CUBA underscored the important role of the scientific and technical body to “future-proof” the ILBI. CANADA noted that the composition of a scientific and technical body will ultimately decide its functions, cautioning against introducing language that allows the COP to adopt amendments to the new treaty.

The DOMINICAN REPUBLIC pointed to the Convention on Biological Diversity’s (CBD) work on and criteria for ecologically or biologically significant marine areas (EBSAs) and inquired whether the ILBI would establish a new scientific and technical body or make use of the CBD’s SBSTTA.

IUCN suggested “adoption and implementation” of ABMTs, stressing that the precautionary principle and ecosystem approach should be applied throughout the agreement. The CBD drew attention to two sets of criteria adopted under the Convention, namely on EBSAs and on the scientific guidance for selecting areas for a representative network of MPAs. WWF called for explicitly addressing the designation of MPAs, and highlighted OECMs, marine spatial planning, and an open-ended list of ABMTs.

Elaboration of criteria: On a paragraph noting that the identification criteria shall be applied by the scientific and technical body, P-SIDS, MONACO, the US, JAPAN, and others stressed that the process should be initiated by states parties. MONACO said that the scientific and technical body will have a role in consultations and proposal evaluation. JAPAN emphasized the scientific body’s advisory role. The US, supported by SWITZERLAND, noted that the identification criteria shall be taken into account by the scientific body when reviewing proposals. CANADA said the respective mandates of the scientific body and COP should be clarified.

On language that such criteria should be taken into account in the establishment of ABMTs under other instruments, frameworks, and bodies, the EU, P-SIDS, MONACO, and CHINA cautioned against imposing criteria on other bodies, with CANADA drawing attention to the status of non-parties to the ILBI. The EU suggested that a state party, which is also a party to an existing framework, should endeavor to promote the objectives of the ILBI when participating in decision making in the other body. CHINA, supported by ICELAND, proposed that other bodies “may” consider the criteria, but their application should not be mandatory. JAPAN, supported by the US, NORWAY, and the PHILIPPINES, suggested to “encourage” the consideration of the criteria by other bodies.

The LIKE-MINDED LATIN AMERICAN COUNTRIES, AUSTRALIA, the REPUBLIC OF KOREA, and the PHILIPPINES preferred deleting the paragraph in its entirety, with the REPUBLIC OF KOREA suggesting moving it to the article on proposals. TURKEY noted that provisions on the role of the scientific body are better addressed under the articles related to decision making and implementation.

MAURITIUS queried whether identifying an area for an ABMT or MPA that has already been identified as an EBSA under the CBD would conflict with the “not undermining” principle.

In the Corridors

Wednesday morning opened with IGC President Lee wishing delegations well as they opened discussions in the informal working group on ABMTs. Rather than deleting large portions of text due to lack of consensus, delegates worked their way through a forest of proposed textual changes regarding the list of criteria to be included in the identification of areas requiring protection as well as relevant modalities for their application. Discussions highlighted the need to infuse overarching principles into the treaty, and unsurprisingly gave way to the now familiar exchange on references to the precautionary approach vs. the precautionary principle.

Woven throughout concrete textual proposals, strong calls were made to keep an eye on the purpose of the global treaty. As the pace of discussions was once more addressed in the corridors, one delegate urged progress, saying that “millions of species are at risk and that should spur us to better use the time we have here.” Another one opined that, at some points in plenary, “it seems we are still in PrepCom-mode, and not at the tail-end of negotiating an agreement to preserve the threatened common heritage of humankind.”

During the afternoon, when informal-informal sessions resumed, there was a sense of optimism coupled with a renewed sense of urgency. The jury is still out on whether the new format will progress negotiations substantively and assist in bridging archetypal dichotomies between regional groups on the elements of the package.