

BBNJ IGC-3 Highlights: Thursday, 29 August 2019

The third session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) met in two informal working groups on environmental impact assessments (EIAs) and cross-cutting issues. In the last “informal-informal” of the meeting, delegates met briefly to discuss marine genetic resources, including benefit-sharing questions.

Informal Working Group on EIAs

Public notification and consultation: The US, supported by the REPUBLIC OF KOREA, proposed the title “public notification and opportunity for comment.”

Early notification: The G-77/CHINA, CARICOM, the LIKE-MINDED LATIN AMERICAN COUNTRIES, P-SIDS, SWITZERLAND, the AFRICAN GROUP, and many others supported early notification to stakeholders of planned activities. The EU suggested ensuring notification to all relevant stakeholders. CANADA, supported by the PHILIPPINES, NEW ZEALAND, SEYCHELLES, and NORWAY, proposed early notification to “potentially affected states, where those can be identified, in particular adjacent coastal states.” The RUSSIAN FEDERATION proposed submission of comments “before the conclusion of the EIA process.”

Stakeholders: The AFRICAN GROUP, CARICOM, SWITZERLAND, NORWAY, and P-SIDS supported a provision specifying the stakeholders. CARICOM and P-SIDS requested reference to “sub-regional” bodies. CANADA called for deleting references to scientific experts, affected parties, adjacent communities and organizations, interested and relevant stakeholders, and those with existing interests in the area. The EU emphasized that the provision includes too much detail. The RUSSIAN FEDERATION, CHINA, the US, and the REPUBLIC OF KOREA proposed deleting the paragraph, finding the scope too broad.

Transparency and inclusivity: The G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, P-SIDS, the AFRICAN GROUP, and many others supported a provision noting that the public notification and consultation process should be transparent, and inclusive, emphasizing that it be targeted, and proactive when involving adjacent SIDS. CARICOM and P-SIDS suggested that the process be done in a timely manner. The LIKE-MINDED LATIN AMERICAN COUNTRIES and the PHILIPPINES proposed involving all adjacent coastal states. The EU and SWITZERLAND did not support singling out particular

stakeholders. The RUSSIAN FEDERATION, CHINA, the US, and the REPUBLIC OF KOREA proposed deleting “targeted and proactive when involving adjacent SIDS.”

Comments: Regarding comments received, the EU suggested: noting the importance of responses to all comments, not just “substantive” ones, supported by many, and opposed by the RUSSIAN FEDERATION and the US; giving particular regard to comments concerning potential impacts to ABNJ rather than to transboundary impacts, supported by CANADA; and deleting a provision on the publication of received comments along with descriptions of how they were addressed. CANADA proposed providing “an indication” of how the comments were addressed. The REPUBLIC OF KOREA and the RUSSIAN FEDERATION did not support a requirement to address or respond to comments, with the RUSSIAN FEDERATION adding that comments shall be considered “to the extent practicable,” and CHINA proposing “as appropriate by states parties.”

Access to information: The EU, AUSTRALIA, and INDONESIA supported that states parties establish procedures allowing for access to information related to the EIA process. CARICOM stressed that all states parties, not just those that undertake an EIA, should establish relevant procedures. P-SIDS, with SEYCHELLES, proposed the scientific and technical body should elaborate relevant procedures for adoption by the COP.

Non-disclosure: The EU, CANADA, the US, the PHILIPPINES, and the REPUBLIC OF KOREA supported reference to the non-disclosure of non-public information or information that would undermine intellectual property rights (IPRs) or other interests. SWITZERLAND suggested including “without prejudice to the protection of confidential information.” CARICOM requested that such information be made available to the scientific and technical body for its review. NORWAY, supported by the HIGH SEAS ALLIANCE, opined that non-disclosure of non-public information that does not undermine “other interests” is too broad. The HIGH SEAS ALLIANCE suggested that states parties shall not be required to disclose “commercially confidential information according to standards and guidelines established by the COP and subject to any review procedures recommended by the COP.”

Consultation for monitoring, reporting, and review: On a provision on states parties being consulted or kept informed during the monitoring, reporting, and review processes, the EU and CANADA stressed that this process follows the agreed EIA process and, with the P-SIDS, CANADA, NORWAY, and the PHILIPPINES, should be dealt with under the relevant provisions. CARICOM, the PHILIPPINES, and SRI LANKA noted the need to actively consult all states, particularly adjacent coastal

states, including SIDS. The RUSSIAN FEDERATION, the US, the REPUBLIC OF KOREA, and CHINA proposed deleting the provision.

International consultation: The EU, SWITZERLAND, the PHILIPPINES, SEYCHELLES, CANADA, and INDONESIA, opposed by the US and CHINA, supported a provision on the development of procedures by the COP to facilitate consultation at the international level. The RUSSIAN FEDERATION proposed deletion, suggesting that these procedures be laid out in an annex as part of guiding principles.

The EU suggested an additional provision enabling the COP to request a subsidiary body to develop recommendations and guidelines on the conduct of the EIA process. P-SIDS, supported by NORWAY, proposed that in cases where the planned activities affect areas of high seas that are entirely surrounded by exclusive economic zones, the views and comments of these states shall be given particular regard.

Preparation and content of environmental impact assessment reports: The G-77/CHINA, the AFRICAN GROUP, CARICOM, AUSTRALIA, the PHILIPPINES, and the HIGH SEAS ALLIANCE supported the ILBI outlining a minimum, mandatory list of information to be included in the reports. The RUSSIAN FEDERATION said it should be an indicative list in an annex. CHINA favored an indicative list. The REPUBLIC OF KOREA emphasized that a detailed list could be part of voluntary guidelines developed later. The LIKE-MINDED LATIN AMERICAN COUNTRIES and the EU supported that the ILBI outline the mandatory list of information to be included.

The EU and CANADA supported including a description of the planned activity, its purpose, and location, with the LIKE-MINDED LATIN AMERICAN COUNTRIES preferring “geo-referential location.”

The LIKE-MINDED LATIN AMERICAN COUNTRIES, CANADA, SINGAPORE, and the EU supported a description of the results of the scoping exercise.

The LIKE-MINDED LATIN AMERICAN COUNTRIES, the EU, and CANADA supported including a description of the marine environment likely to be affected. The US suggested taking into account large-scale, reasonable, foreseeable changes in the marine environment, such as ocean acidification.

Regarding a provision to include a description of the potential effects of the planned activity on the marine environment, the LIKE-MINDED LATIN AMERICAN COUNTRIES supported the text, requesting adding “environmental impacts.” CARICOM proposed referring to impacts in the marine environment “and ecosystems.” P-SIDS, the EU, and CANADA requested deleting reference to the likelihood that the assessed activity will cause substantial pollution and harmful changes, with the EU also calling to delete reference to estimates of significance. CANADA requested reference to accidents and malfunctions. The US, AUSTRALIA, and ISRAEL did not support reference to socio-economic and cultural impacts. The ICPC suggested including socio-economic impacts, both beneficial and adversary, as a standalone provision.

The EU and the US favored including a description of any measures to avoid, prevent, and mitigate impacts. The LIKE-MINDED LATIN AMERICAN COUNTRIES and SENEGAL requested additional reference to measures for “minimizing” impacts and, “where necessary and possible, redressing any substantial pollution, significant, and harmful changes to the marine

environment, and other adverse social, economic, cultural, and relevant impacts,” with P-SIDS, INDONESIA, and the HIGH SEAS ALLIANCE, requesting deleting “where necessary and possible.”

The LIKE-MINDED LATIN AMERICAN COUNTRIES requested including a description of any follow-up actions. The EU requested the reference to post-project analysis and remediation be moved to the provision on the description of measures for avoiding, preventing, and mitigating impacts. The US did not support reference to post-projects analysis and plans for remediation.

The LIKE-MINDED LATIN AMERICAN COUNTRIES, opposed by the EU, supported: the reference to the sources of information contained in the report; an explicit indication of predictive methods and underlying assumptions, as well as the relevant environmental data used; reference to the methodology used to identify environmental impacts; including an environmental management plan, including a contingency plan for responding to incidents; and including the environmental record of the proponent, opposed by the US.

THE LIKE-MINDED LATIN AMERICAN COUNTRIES, the US, CHINA, ISRAEL, AUSTRALIA, and the EU requested deleting the reference to a review of a planned activity’s business plan. CARICOM proposed instead referring to an activity’s cost-benefit analysis.

Report review: Regarding a provision on who and how further “details” or “guidance” on the required content of an EIA report may be developed and reviewed, the G-77/CHINA, CARICOM, and P-SIDS referred to “details and/or guidance,” the LIKE-MINDED LATIN AMERICAN COUNTRIES, INDONESIA and the US to “guidance,” and the EU to “details.” The G-77/CHINA noted it should be developed by “a scientific and technical body for consideration and adoption by the COP.” The EU supported it be developed by the COP, with the US and CHINA, and calling, with CARICOM and P-SIDS, for it to be annexed to the ILBI. The EU and CARICOM favored “regular” review, while P-SIDS and NIGERIA preferred review “as necessary.” NORWAY and CANADA questioned the need for updating the comprehensive list.

Publication of assessment reports: The G-77/CHINA supported requiring states parties to publish and communicate the reports of the results of EIAs, with the EU, CANADA, and the RUSSIAN FEDERATION, requesting deletion of “and communicate.” The REPUBLIC OF KOREA suggested “publish and provide.” The AFRICAN GROUP, the EU, P-SIDS, CANADA, and the RUSSIAN FEDERATION opposed referring to specific UNCLOS articles, preferring that publication be done “in accordance with the Convention.” The AFRICAN GROUP, CARICOM, P-SIDS, the RUSSIAN FEDERATION, NORWAY, the US, and NEW ZEALAND supported publication of EIA reports “through the clearing-house mechanism (CHM).” NEW ZEALAND noted the CHM should publish stakeholders’ submissions received during consultation.

The LIKE-MINDED LATIN AMERICAN COUNTRIES proposed that the secretariat centralize and disseminate the information to all states. SWITZERLAND suggested publication be performed by states parties through the secretariat. The EU proposed the publication through a dedicated registry under the ILBI. CHINA suggested deleting the provision. The HIGH SEAS ALLIANCE suggested ensuring that the full report is communicated to all states parties and stakeholders.

Consideration and review of assessment reports: Regarding a provision on the consideration and review of EIA reports, the AFRICAN GROUP, INDONESIA, SEYCHELLES, SENEGAL,

and the HIGH SEAS ALLIANCE supported that the reports be considered and reviewed by a scientific and technical body. The LIKE-MINDED LATIN AMERICAN COUNTRIES, NORWAY, and NEW ZEALAND preferred review by states parties. NORWAY noted the review reports might be made publicly available through the CHM. NEW ZEALAND highlighted that a subsidiary body might have a role in reviewing some of the reports.

The AFRICAN GROUP and the LIKE-MINDED LATIN AMERICAN COUNTRIES noted the review should be done on the basis of approved scientific methods, with the LIKE-MINDED LATIN AMERICAN COUNTRIES also referring to possible guidelines developed by the scientific and technical body and adopted by the COP. AUSTRALIA called for balancing international accountability with the rights of states parties. The RUSSIAN FEDERATION, the US, JAPAN, the EU, CANADA, SINGAPORE, and ISRAEL requested deleting the provision.

The HIGH SEAS ALLIANCE called for a “backstop clause” if the review of all EIAs is impossible.

Informal Working Group on Cross-Cutting Issues

Institutional Arrangements: COP: Many supported the establishment of a COP, and having the first meeting convene no later than one year after the ILBI’s entry into force. The LIKE-MINDED LATIN AMERICAN COUNTRIES proposed that the COP meet “every year” thereafter. The RUSSIAN FEDERATION stated that the COP, rather than the ILBI, determine meeting periodicity. The G-77/CHINA, with the AFRICAN GROUP, proposed that COP adopt rules of procedure for itself and for any subsidiary body that it may establish. The LIKE-MINDED LATIN AMERICAN COUNTRIES supported the use of the IGC’s rules of procedure, until the COP adopts its own.

The US, the RUSSIAN FEDERATION, CHINA, ICELAND, and others underlined consensus-based decision making, including to adopt the rules of procedure. CANADA and SWITZERLAND supported consensus-based adoption of rules of procedure, but were open to voting for decision making in other cases. NEW ZEALAND, with AUSTRALIA and the HIGH SEAS ALLIANCE, supported a stand-alone provision on decision making. The AFRICAN GROUP, with P-SIDS, underlined the need to include a voting option for decision making.

NEW ZEALAND, also on behalf of NORWAY, AUSTRALIA, and CANADA, supported by P-SIDS, ICPC, and the HIGH SEAS ALLIANCE, introduced a proposal for a new article on transparency.

Subsidiary bodies under the COP: The G-77/CHINA supported the COP’s functions for monitoring and keeping under review the ILBI’s implementation, with several requesting clarity regarding “keeping under review.” The RUSSIAN FEDERATION supported the COP reviewing the ILBI’s implementation. The EU, with NEW ZEALAND, proposed that the COP keep the ILBI’s implementation under regular review and make the necessary decisions to promote effective implementation.

The G-77/CHINA supported that the COP promote cooperation and coordination with, and among existing instruments, frameworks, and bodies, proposing that this be done “with a view to promoting coherence among efforts towards the conservation and sustainable use of BBNJ.” CARICOM, opposed by P-SIDS and the REPUBLIC OF KOREA, requested retaining references to “including by establishing processes for cooperation and coordination among relevant global, regional and sectoral bodies,” with NEW

ZEALAND, but opposed by the RUSSIAN FEDERATION; and inviting other global, regional and sectoral bodies to establish cooperation processes.

The G-77/CHINA, with NEW ZEALAND, further supported listing that the COP shall: make, within its mandate, decisions and recommendations related to the implementation of the ILBI; exchange information relevant to the implementation of the ILBI; adopt, at each ordinary meeting, a budget for the financial period until the following ordinary meeting; and undertake other functions identified in the ILBI or as may be required for its implementation.

The G-77/CHINA, TURKEY, and NEW ZEALAND, opposed by the RUSSIAN FEDERATION, supported mandating the COP to establish subsidiary bodies. The G-77/CHINA, opposed by JAPAN, the US, ICELAND, and others, supported also including a non-exhaustive list of bodies. The LIKE-MINDED LATIN AMERICAN COUNTRIES and NEW ZEALAND preferred that the COP decide on these bodies at a later stage. The AFRICAN GROUP, with SRI LANKA, TURKEY, and others, expressed strong support for including an access and benefit-sharing mechanism in the list. CARICOM expressed reservations on an implementation and compliance committee.

The G-77/CHINA and NEW ZEALAND expressed general support for a provision tasking the COP with assessing and reviewing the adequacy and effectiveness of ILBI provisions. NEW ZEALAND suggested linking this provision to implementation and compliance. CARICOM, with the EU, preferred that the COP conduct the assessment and review. The RUSSIAN FEDERATION preferred mandating the COP to “give recommendations.” The EU proposed mandating the COP to carry out the assessment and review within five years of the entry into force.

Scientific and Technical Body/Network: The G-77/CHINA, the EU, SWITZERLAND, the REPUBLIC OF KOREA, CANADA, NEW ZEALAND, AUSTRALIA, and JAPAN supported establishing a scientific and technical body, with P-SIDS adding it should also be a technological body. The RUSSIAN FEDERATION suggested deleting the entire article, noting that the provisions will create a “politicized and overly bureaucratic body.” ICELAND envisaged a slim institutional structure, relying on regional and sectoral bodies in terms of technical expertise.

The EU and AUSTRALIA noted the body shall be composed of experts “with suitable scientific qualification,” with JAPAN, CHINA, and the US, taking into account the need for multidisciplinary expertise, including traditional knowledge (TK) expertise, gender balance, and equitable geographical representation. P-SIDS emphasized “TK of indigenous peoples and local communities.”

The LIKE-MINDED LATIN AMERICAN COUNTRIES proposed deleting the reference to TK. The US noted that the body should be open to representatives of non-party states. CHINA cautioned against creating a large structure. ECUADOR and SRI LANKA emphasized equitable geographical representation.

The EU, SENEGAL, and the UN ENVIRONMENT PROGRAMME (UNEP) supported that the body may also draw on appropriate advice from existing arrangements, such as the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection. The G-77/CHINA, the US, ICELAND, AUSTRALIA, CANADA, and NORWAY also supported the provision, requesting deleting the reference to the Joint Group of Experts. The US suggested that the body could create *ad hoc* scientific and technical

advice bodies for a limited duration. The LIKE-MINDED LATIN AMERICAN COUNTRIES requested deleting the provision. CHINA opined that there is no need for a detailed provision.

The EU, SWITZERLAND, the US, ICELAND, the REPUBLIC OF KOREA, and NORWAY preferred referring to a short list of essential functions, emphasizing the body shall be “advisory in nature,” with the LIKE-MINDED LATIN AMERICAN COUNTRIES, and “operate under the guidance and authority of the COP.” As core functions, the EU highlighted: providing scientific and technical advice to the COP, with CARICOM; maintaining contact with the scientific world; and proposing the establishment of sub-committees. CARICOM and P-SIDS emphasized the body should provide scientific and technical advice beyond COP requests. P-SIDS noted needs’ assessment mechanisms should be country driven. The LIKE-MINDED LATIN AMERICAN COUNTRIES reiterated that functions should be contained in an annex.

On the list of functions, delegates expressed diverging opinions on which should be kept, with many noting that some are covered in different parts of the agreement and that they should be decided once the substantive discussions are finalized.

Secretariat: The G-77/CHINA and many others supported the establishment of a secretariat. The EU indicated that key functions need to be determined before deciding on size, function, and budget. CHINA, CANADA, SWITZERLAND, and TURKEY, opposed by CAMEROON and ICELAND, preferred the secretariat of an existing international organization as the ILBI secretariat.

NORWAY, ICELAND, CANADA, the RUSSIAN FEDERATION, and the US expressed preference for UNDOALOS carrying out secretariat functions. The IGC requested the Under-Secretary-General for Legal Affairs and UN Legal Counsel to submit information to the IGC on what it would take for UNDOALOS to perform the secretariat function of the ILBI.

The RUSSIAN FEDERATION, ICELAND, the US, and TURKEY, opposed by INDONESIA, did not support the International Seabed Authority (ISA) carrying out secretariat functions.

CANADA and CHINA highlighted that assisting with ILBI implementation is not a secretariat function and, with the RUSSIAN FEDERATION and the US, proposed deleting this reference. CHINA did not support the secretariat preparing reports on the execution of its functions, with the US and JAPAN cautioning against burdensome reporting requirements.

CHM: The G-77/CHINA and others, opposed by JAPAN, supported the establishment of a CHM. JAPAN highlighted existing bodies could perform CHM functions, highlighting that ABMTs-related information could be shared by UNEP, and EIA-related information by UNDOALOS.

CHINA and JAPAN requested clarification on the need for a network of experts and practitioners, with JAPAN inquiring whether such experts would be considered CHM staff.

The G-77/CHINA noted the specific operating modalities of the CHM should be “future proofed” and the platform be freely accessible over an appropriate technological route, noting that who would perform the CHM function is dependent on the entity that will perform the secretariat functions.

CARICOM supported the CHM be managed by an existing institution, such as IOC-UNESCO or the ISA. JAPAN proposed the CHM be managed by the ILBI secretariat in association with IOC-UNESCO and other relevant organizations, pointing also to the ISA and IMO.

CHINA supported that due regard shall be given to the confidentiality of information provided under the ILBI. CARICOM preferred respecting or maintaining confidentiality. SWITZERLAND proposed information sharing through the CHM without prejudice to the protection of confidentiality of information and taking into account all rights that may be attached to such information.

Dispute settlement: Many supported establishing a dispute settlement mechanism, cautioning that disputes settlements can be very costly, especially for developing states. Some delegates supported that provisions set out in UNCLOS Part XV apply *mutatis mutandis* to any dispute between states parties. Others suggested giving relevant jurisdiction to the International Tribunal on the Law of the Sea (ITLOS). Yet others favored that states parties be given the choice to select the appropriate mechanism. Some delegations reserved their positions.

The LIKE-MINDED LATIN AMERICAN COUNTRIES suggested an additional provision noting that no action or activity taken on the basis of this agreement will be construed or considered to be prejudicial to the positions of states parties to a land, insular, or maritime sovereignty dispute or to a dispute concerning the delimitation of maritime areas. SWITZERLAND underscored that maritime disputes and sovereign issues are not part of the BBNJ agreement. P-SIDS suggested an additional provision that disputes between states parties on the interpretation or application of the ILBI may be submitted to a special ITLOS chamber, whether or not they are parties to the Convention.

SOUTH AFRICA suggested that if states parties to a dispute have not accepted the same procedure for the settlement of the dispute, that dispute may be submitted to ITLOS. COLOMBIA and EL SALVADOR did not support the provisions, noting that they do not promote universal participation. TURKEY did not support any reference to UNCLOS, noting that relevant provisions can only be applied on a voluntary basis. The HIGH SEAS ALLIANCE called for cost-effective and non-confrontational provisions.

In the Corridors

On the penultimate day of IGC-3, delegates started the day eagerly awaiting René Lefebvre’s report on progress made in the informal-informals on EIAs. Acknowledging that some might be pessimistic as there are still strongly-held divergent views on important conceptual issues, Facilitator Lefebvre emphasized “we are now closer to reaching compromise at IGC-4.” Noting he had “lost track of the number of hours” spent trying to make progress behind closed doors, he foreshadowed what was to come: delegates were in for a long day, with the informal working group on cross-cutting issues going well over time in an attempt to address all the remaining cross cutting issues.

Leaving plenary long after the interpreters had packed it in for the day, one visibly weary delegate wondered “why didn’t we put in more hours during the first week when everyone was still fresh and well-spirited,” with another observer noting that, in the absence of revision to the revised programme of work she was “caught by surprise and on a growling stomach!” Looking ahead, Friday promises an important discussion on the way forward, with some delegates confiding “we are not sure we can see the light at the end of the tunnel just yet.”

The *Earth Negotiations Bulletin* summary and analysis of IGC-3 will be available on Monday, 2 September 2019, at <http://enb.iisd.org/oceans/bbnj/igc3>