

BBNJ IGC-1 Highlights: Monday, 10 September 2018

The informal working group on area-based management tools (ABMTs) discussed global, regional, and hybrid approaches, focusing on:

- the decision-making process;
- consultation; and
- institutional arrangements.

The informal working group on environmental impact assessments (EIAs), facilitated by René Lefeber, the Netherlands, focused on:

- relationships with other agreements; and
- criteria and thresholds.

Informal Working Group on ABMTs

Criteria: The AFRICAN GROUP supported criteria for MPA establishment, allowing for different levels of protection. CARICOM indicated that the international legally binding instrument (ILBI) should set out general provisions and criteria for recognizing established ABMTs. ARGENTINA queried if vulnerable areas could be proposed even if they have not been identified as such before the adoption of the ILBI, considering the Ecologically or Biologically Significant Marine Area (EBSA) criteria useful to that end. MAURITIUS suggested basing ABMT designation on factors including degree of threat and size of the area affected. CHINA favored marine protected area (MPA) identification based on best scientific evidence, with reference to existing ABMT practice. MEXICO proposed as criteria: uniqueness, rarity, vulnerability, biodiversity, interconnectedness, and environmental protection.

THAILAND recommended: recognizing existing criteria for identifying areas in need of protection, including EBSAs, Particularly Sensitive Sea Areas (PSSAs), Vulnerable Marine Ecosystems (VMEs) and those under the Convention on Migratory Species (CMS); developing mandatory targets for different levels of protection, in line with the Aichi targets and SDG 14; and considering marine spatial planning (MSP) as a complementary tool under the ILBI.

Submissions: The AFRICAN GROUP supported submission of ABMT proposals from parties and competent organizations. P-SIDS suggested that parties, and relevant sectoral and regional organizations submit proposals individually or jointly. MAURITIUS preferred collective proposals to unilateral ones. CARICOM indicated that a party or the ILBI scientific committee may submit

proposals. The PHILIPPINES favored proposals submitted by states, regional bodies or intergovernmental organizations, in consultation with coastal states.

BRAZIL, JAPAN, COSTA RICA, and the REPUBLIC OF KOREA supported proposals by state parties. NORWAY proposed that regional seas mechanisms develop proposals, and in regions with no mechanism, states in the region may develop a proposal.

Content of ABMT Proposals: The AFRICAN GROUP supported including management measures and objectives. P-SIDS suggested including the objective, proposed measures, and a management plan including monitoring and review (M&R). CHINA suggested including protection objectives, a legal basis, scientific data, management plans and measures, and a time limit for protection. JAPAN proposed incorporating: the identification of the ABMT area, citing examples such as PSSAs, VMEs and EBSAs; draft conservation and management measures; and a timeline for review.

Decision-making Process: The AFRICAN GROUP, P-SIDS, and BRAZIL favored a global approach without undermining existing instruments and bodies, with the AFRICAN GROUP supporting an ILBI decision-making body, including on establishing MPAs, on the basis of recommendations from an ILBI scientific and technical body. TONGA favored a strong global institutional arrangement mandated to consult with competent organizations, calling for due regard to inputs by adjacent coastal states. SOUTH AFRICA called for: a global approach to give effect to international commitments, by defining under the ILBI a process to identify, designate, effectively manage, and enforce a global representative MPA network; and a mechanism for global monitoring, control, and surveillance.

CARICOM indicated that the ILBI conference of the parties (COP) should make the final decision, and the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection could be part of an evaluating body. BRAZIL favored: consideration of proposals by a scientific/technical committee, supported by an independent pool of experts; decisions taken by a COP; and implementation by flag-state members.

COLOMBIA called for a global, consensus-based decision-making body, allowing for voting as a last resort, on the basis of a recommendation from a scientific and technical subsidiary body that will also assess the effectiveness and coherence of new measures. The FSM suggested that regional and subregional institutions implement management measures without imposing disproportionate conservation burdens on adjacent coastal states,

particularly SIDS. MEXICO noted that decisions to establish management mechanisms should be binding on state parties with an obligation to cooperate with non-parties.

The PHILIPPINES called for: coordinating sectoral and regional organizations' mandates under the ILBI's body oversight; identifying areas to be protected through regional and subregional scientific bodies in a flexible and adaptive manner; and designating and managing ABMTs at the regional level, subject to global oversight under the ILBI COP.

CHINA, URUGUAY, and the REPUBLIC OF KOREA proposed COP consensus decisions, with CANADA calling for a high voting threshold as a possible last resort. The REPUBLIC OF KOREA recommended that ABMT duration should be based on scientific evidence.

SINGAPORE favored a global approach dealing with existing gaps, and providing a platform for consultation and exchange among institutions on proposals, with decisions made by the "body that is more competent and able to do so," be it the ILBI body or other relevant body in consultation with the other. JAPAN supported a hybrid approach, whereby submissions, including inputs from prior consultations, are sent to: the ILBI scientific committee for evaluation; the COP for consensus decision-making; and competent existing organizations for a final decision on whether the ABMT will be implemented. He noted the ILBI should stipulate that the measure would be binding on all, including non-members of relevant instruments.

NEW ZEALAND, supported by CHILE, outlined a hybrid approach, with: a global body providing guidelines for states and competent bodies to identify priority features, habitats or measures, including MPAs; regional and sectoral bodies implementing, monitoring, and enforcing relevant conservation and management measures, coordinating with others, sharing information, and reporting on implementation; and states implementing the ILBI with respect to their flagged vessels and nationals, engaging in processes on adjacent maritime zones, and reporting on implementation. AUSTRALIA favored a hybrid model: recognizing the knowledge and science base of regional and sectoral bodies, and encouraging them to make better use of ABMTs, with reporting mechanisms; and mandating the ILBI COP to discuss implementation and share information.

The HOLY SEE preferred a hybrid model, with global coordination of conservation in cooperation with regional and business sectors, with regional seas programmes communicating with the ILBI COP to create a global environmental, social, and economic baseline for ABNJ and to articulate conservation strategies, including MSP, for consideration by sectoral and regional stakeholders.

Cautioning against a global, centralized system duplicating mandates and undermining instruments, the US suggested: a process of site selection and proposal, scientific review, and identification, in close collaboration with regional and sectoral bodies; consensus decisions; and a geographically and technically balanced advisory group for scientific assessment of proposals. CANADA described a two-phase approach where the ILBI decision-making body will make an initial decision on whether further work should be pursued on a proposal based on its rationale, scientific assessment, objectives, and ABMT type; followed by a wider consultation, including relevant frameworks and bodies, interested stakeholders tailored to each ABMT, and taking into account neighboring coastal states' views and relevant traditional knowledge.

The RUSSIAN FEDERATION favored a regional approach, recommending that existing regional and sectoral bodies continue to take decisions on ABMTs, and cautioning against politicizing the process through global majority voting. Advocating a regional model, ICELAND proposed holding regular global meetings for assessing ABMTs effectiveness similar to the UN Fish Stocks Review Conference. ARGENTINA cautioned against developing a "toothless treaty" and delegating decisions on ABMTs to bodies or mechanisms outside the ILBI.

NORWAY proposed: publishing proposals for comments, possibly facilitated by UNDOALOS; receiving comments from states, scientists, and NGOs; forwarding proposals for review to competent bodies; consulting adjacent coastal states directly; possibly carrying out a scientific peer review by a designated group; and adopting proposals, binding on ILBI parties, through regional seas mechanisms, to be made public together with related ecological values and conservation goals; submitting the decision to competent sectoral bodies to take complementary measures to contribute to the MPA objectives, as management measures or restrictions of commercial activities would be left to these bodies; and including the MPA on the agenda of the COP for review, with the possibility for other bodies to explain their measures, providing an opportunity for evaluation and scrutiny.

Consultation: The AFRICAN GROUP supported a consultation process engaging all relevant bodies and other stakeholders. CHINA opposed an exhaustive list of stakeholders, recommending that the scope of participation is based on objectives, targets, regions, and entities involved in the proposed ABMTs; and recommended consultation between the scientific/technical committee and other relevant bodies if ABMT proposals overlap with their mandates. TONGA underlined the need to provide timely notification to affected states and stakeholders. COLOMBIA favored a broad and transparent consultation process to allow for proposal adjustments.

JAPAN recommended consultations with existing relevant bodies prior to proposal submission, as well as a time-bound consultation with a wide range of actors through the ILBI secretariat. The HOLY SEE called for full participation and input by regional and sectoral bodies prior to proposal development, taking into account impacts on workers, investors, and coastal communities, and considering potential compensation. The US called for a time-bound consultation process, open to all stakeholders with relevant knowledge. URUGUAY emphasized mandatory consultations.

Monitoring: Cautioning against setting time limits, P-SIDS, with MEXICO and COSTA RICA, recommended regular reviews of effectiveness. CARICOM and COLOMBIA called for a follow-up, M&R process. URUGUAY suggested a transparent procedure for financing ABMTs, in addition to monitoring.

Institutional Arrangements: The AFRICAN GROUP suggested: as a minimum institutional arrangement, a COP making decisions, setting standards, and monitoring and reviewing, together with a secretariat and an advisory scientific and technical body; and, as beneficial for ILBI, also an implementation body, a clearinghouse, and a financial mechanism. SENEGAL also suggested allowing for the creation of *ad hoc* bodies to tackle new issues. URUGUAY recommended an independent scientific body to analyze proposals prior to referring them to COP.

P-SIDS highlighted: a decision-making COP and a scientific body, including for assessing ABMT proposals; and a possible list of independent experts or a committee/working group under the ILBI, with the FSM stressing that traditional knowledge should play a central role and complement formal science. CARICOM envisaged a

COP, a secretariat, a scientific or technical advisory committee, and a repository for sharing information. CHINA proposed establishing a COP, a council, and a secretariat, without prejudice to existing bodies' mandates. NEW ZEALAND proposed a COP providing guidelines and administering a global database, and a subsidiary scientific body. CANADA called for: a decision-making body; a secretariat; and a strong, scientific advisory body.

Informal Working Group on EIAs

Obligation: BRAZIL, SINGAPORE, CANADA, JAPAN, and NEW ZEALAND underscored relevant guidance under UNCLOS Articles 204-206 (monitoring and EIAs). SINGAPORE stressed that lack of clarity in specific instances may be resolved through UNCLOS compulsory dispute settlement. The AFRICAN GROUP called for a global framework setting standards and minimum requirements.

The HOLY SEE proposed that the ILBI make UNCLOS due diligence obligation into an applicable defense for entities under a state's jurisdiction or control, including for the purposes of assuming the cost of EIA, enforcement, and damages. CHINA encouraged parties to adopt domestic legislation establishing EIAs procedures for activities in areas beyond national jurisdiction (ABNJ). NORWAY emphasized the duty of the flag state to conduct EIAs based on UNCLOS obligations.

Relationship with Other Instruments: Several underscored the importance of respecting existing instruments, frameworks, and processes. JAPAN referred to examples of oil discharges and ballast water requirements under the International Maritime Organization, noting that new EIA requirements would cause confusion. BRAZIL and others underscored the Protocol on Environmental Protection to the Antarctic Treaty as a good example. INDONESIA noted that the ILBI should include specific EIA provisions based on existing instruments like the Convention on Biological Diversity. COLOMBIA pointed to the 2018 Advisory Opinion of the Inter-American Court of Human Rights on human rights and the environment.

CHINA cautioned against establishing EIA rules for activities already covered by other EIA-related instruments. The US noted that EIAs conducted under other instruments may fulfill the ILBI requirements if the threshold is similar, and in the absence of thresholds under other agreements, the ILBI would fill this gap. SINGAPORE, CANADA, and NEW ZEALAND noted that, in cases of different thresholds in other processes, the ILBI threshold should apply, calling for consultations to allow for some harmonization.

Thresholds and Criteria: The AFRICAN GROUP suggested adopting the threshold under the Protocol on Environmental Protection to the Antarctic Treaty that refers to minor or transitory impact. MEXICO favored: establishing minimum standards; subjecting to EIA any activity with the potential to cause harm to the marine environment; and taking into account the possible ecological connectivity between an area or activity in ABNJ and potential impacts within national jurisdiction. The PHILIPPINES highlighted sensitivity of location, magnitude of adverse effects, and scale of development, calling for review and assessment by a scientific committee.

CHINA, with the US and others, argued that UNCLOS provides a threshold, namely the potential to cause substantial pollution or significant and harmful changes to the marine environment, and stated the ILBI could provide guidance on how to define "significant and harmful changes." JAPAN emphasized that UNCLOS Article

206 provisions may be elaborated through guidelines, annexed to the ILBI. The REPUBLIC OF KOREA distinguished among cases requiring: no EIA, because of less than minor impact; preliminary EIAs, with no R&M requirements, in cases of minor environmental impact; and a formal EIA in cases of significant impact. SWITZERLAND supported using existing procedures and conducting one EIA per activity.

List of activities: The G-77/CHINA expressed openness to consider an indicative list of activities requiring EIAs, calling for flexibility and regular updates to include technological advances. BRAZIL did not favor including a list. The PHILIPPINES supported including a non-exhaustive list, with MEXICO suggesting inclusion as part of the ILBI text or as an annex subject to review and update when needed.

SINGAPORE cautioned against an over- or under-inclusive list. The REPUBLIC OF KOREA noted that a list can be prepared at a later stage as voluntary guidelines. CANADA called for flexibility, cautioning against creating requirements for formal treaty amendments to reopen a potential list. NEW ZEALAND supported an indicative, non-exhaustive list to be elaborated by COP. JAPAN expressed openness to discuss a list as an appendix to guidelines annexed to the ILBI.

CHINA favored an indicative and non-binding list, if it is to be included. NORWAY underscored the need for a clear and flexible list, if included. The US supported an illustrative, negative and positive, list. AUSTRALIA preferred a tiered approach where activities likely to meet thresholds are initially determined.

Cumulative impacts: Several favored assessing cumulative impacts, with CHINA arguing against a single type of EIA. SENEGAL proposed considering strategic environmental assessments (SEAs). NORWAY underscored the difficulty of assessing cumulative impacts. The US supported consideration of direct, indirect, and cumulative effects. COLOMBIA suggested establishing thresholds, taking into account the cumulative impacts of anthropogenic impacts.

Sensitive areas: The PHILIPPINES and COLOMBIA, opposed by the US, proposed including specific provisions for EIAs in areas identified as ecologically or biologically significant or vulnerable. JAPAN considered unnecessary specific EIA requirements for sensitive areas, if the ILBI includes rules and guidelines in an annex. SINGAPORE, with CANADA, JAPAN, and NEW ZEALAND, stressed that the same threshold may apply to ensure uniformity, emphasizing, with AUSTRALIA, that in vulnerable areas, it will be easier to cross the threshold. NORWAY cautioned against making different rules for EBSAs.

In the Corridors

The second week kicked off with energetic discussions on a global, hybrid or regional approach to ABMTs. Compared to the PrepCom phase, "the fog is clearing," a participant remarked. "Opinions still vary and labels are used inconsistently, but differences mainly boil down to the degree of weight each model will give to regional and sectoral bodies," another delegate offered. "I am sensing a new alliance emerging around increasing the role of regional seas programmes," contributed a long-standing observer, recalling, however, that at a weekend workshop a point was made that, currently, most regional seas conventions do not have a mandate or resources to address issues in ABNJ. "The question remains," reflected another delegate, "what is the right combination of existing and new approaches to make sure the new treaty will have teeth?"



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