

BBNJ IGC-1 Highlights: Tuesday, 11 September 2018

The informal working group on environmental impact assessments (EIAs) focused on:

- decision-making process;
- monitoring, review, and reporting; and
- strategic environmental assessments.

The informal working group on marine genetic resources (MGRs), facilitated by Janine Coye-Felson (Belize), considered scope.

Informal Working Group on EIAs

Thresholds and Criteria: ICELAND and the RUSSIAN FEDERATION supported reference, based on Article 206 of the UN Convention on the Law of the Sea (UNCLOS), to “reasonable grounds to believe that planned activities may cause substantial pollution or significant and harmful changes.” The FSM supported a two-tier approach subjecting to full EIAs activities above the threshold of UNCLOS Article 206.

The RUSSIAN FEDERATION considered any future guidelines on thresholds indicative. INDIA, MAURITIUS, IUCN, and the HIGH SEAS ALLIANCE supported a minimum threshold. MAURITIUS highlighted the existence of sectors lacking EIA requirements.

WWF called for: an EIA regime applicable to all activities; and a two-step threshold-testing mechanism, with a lower test similar to the Antarctic Treaty rather than a higher test similar to UNCLOS Article 206. The HIGH SEAS ALLIANCE called for: binding EIA obligations; conditions drawing from UN General Assembly resolution 61/105 on bottom fishing to assess significant adverse impacts (SAIs) of all activities; and requirements to manage or prevent such impacts.

Cumulative impacts: The FSM and IUCN, opposed by the RUSSIAN FEDERATION, favored considering cumulative impacts, including from climate change and ocean acidification.

Sensitive areas: ICELAND opposed a general application of EIAs in areas beyond national jurisdiction (ABNJ), supporting focusing on areas of high biodiversity such as ecologically or biologically significant areas and vulnerable marine ecosystems (VMEs). IUCN called for mandatory EIA requirements for all activities in ecologically or biologically sensitive areas.

EIA Process: The G-77/CHINA proposed including: screening; scoping; impact prediction and evaluation, using best available scientific information, including traditional knowledge; public notification and consultation; public availability of reports and

decision-making documents; access to information; a decision-making body authorizing proposed activities; and monitoring and review (M&R). INDIA cited the EIA process under the International Seabed Authority (ISA) and the Antarctic Treaty System as potential models.

AOSIS recommended allocating costs to proponents, and a technical expert review to ensure integrity and transparency. CARICOM proposed: screening decisions by a scientific and technical body; a pool of experts for conducting EIAs and relevant evaluations; and decision making by a conference of parties (COP) under the international legally binding instrument (ILBI) on recommendation from the scientific and technical body. JAMAICA highlighted relevant international jurisprudence on the international customary law nature of EIAs on shared resources, and, with COLOMBIA, the Inter-American Court of Human Rights opinion on human rights and the environment, calling for contingency plans to conduct activities in the marine environment.

P-SIDS emphasized: the proponent’s responsibility to demonstrate that a proposed activity does not require an EIA, adding that the scope should include cumulative impacts, best available scientific information, and traditional knowledge; preparation and implementation of environmental management plans; due account of SIDS’ special circumstances; and minimum global decision-making standards.

The EU, CANADA, AUSTRALIA, NEW ZEALAND, NORWAY, and FAO favored an activity-oriented approach, while COLOMBIA preferred a location-oriented one and the HIGH SEAS ALLIANCE an effects-based one to avoid forum shopping. The EU favored: placing on state parties obligations to carry out EIAs and make decisions; setting out the basic content of an EIA in the ILBI; and including explicit obligations to take into account EIA outcomes when authorizing activities accompanied by mitigation measures. FIJI cautioned against being too prescriptive with respect to EIA content; and favored: empowering regional and sectoral organizations; assessing EIA reports submitted by states through a scientific panel, with final recommendations submitted to an overarching body; and adaptive management based on the precautionary approach in implementing mitigation measures.

CANADA proposed: examining alternatives; evaluating residual effects; and sharing information, consulting, and providing scientific advice as steps towards internationalization, noting that states are responsible for conducting EIAs, with the involvement of coastal states in projects having an impact on areas under their jurisdiction. Stressing that decisions should be made by states, NORWAY noted that procedural steps should be included in the ILBI. AUSTRALIA

proposed: a global minimum threshold; and flag states' responsibility to conduct EIAs, determine the level of assessment required, and make decisions on authorizing activities. NEW ZEALAND acknowledged capacity concerns, indicating that depending on the context, EIAs could be conducted at the regional level.

Cautioning against establishing EIA methodologies that could impede the use of MGRs or marine scientific research, MEXICO suggested: assessing the degree of potential harm; and identifying alternatives, and measures to prevent, mitigate, and compensate impacts. The PHILIPPINES called for: making the EIA process accessible to the public; communicating potential adverse effects to adjacent coastal states; and facilitating compliance based on a M&R committee's recommendation. COLOMBIA favored general provisions in the ILBI, and a global scientific committee with regional representation to ensure transparency. CHINA preferred general ILBI provisions on EIAs coupled with detailed recommendations, noting that sponsoring states are responsible for initiating and implementing EIAs, including making decisions, with comments from adjacent coastal states.

The US supported: EIA as a procedural mechanism, which does not prescribe any outcome; protection of non-public information; obligations on states to conduct EIAs, with the possibility to contract a third party; and possible consideration of impacts of activities that occur in ABNJ on adjacent coastal states. He opposed a global decision-making or oversight body, and the inclusion of social and economic considerations. The RUSSIAN FEDERATION opposed internationalizing decision-making or a global EIA evaluation procedure. JAPAN cautioned against a central decision-making body undermining sectoral organizations' mandates; favored EIA guidelines as an annex to the ILBI; and noted that EIAs should be conducted by states, circulating the EIA plan to adjacent coastal states for consultation.

IUCN recommended subjecting all activities to EIAs and offering assistance to ensure adherence to international best practices. OCEANCARE called for incorporating anthropogenic underwater noise under mandatory and comprehensive EIA requirements; preferred a combination of activity- and impact-based approaches; and drew attention to the CMS Family Guidelines on Environmental Impact Assessment for Marine Noise Generating Activities as best practice. The INTERNATIONAL PROTECTION CABLE COMMITTEE urged exempting submarine cable laying and repairing from EIA requirements.

Content of EIA reports: The G-77/CHINA proposed including a non-technical summary and description of: planned activities; reasonable alternatives to planned activities, including non-action alternatives; scoping results; potential effects on the marine environment, including cumulative impacts and transboundary impacts; environment likely to be affected; socioeconomic impacts; measures for avoiding, preventing, and mitigating impacts; follow-up actions, including any monitoring and management programmes; and uncertainties and gaps in knowledge. CHILE proposed that the report should also contain the purpose of the proposed activity, time period, area of influence, and ecosystem services provided in the area. TOGO favored including worst-case-scenario considerations. CHINA recommended that transboundary EIAs should address both the location and the impact. PALAU supported including activities, location, methodologies, possible environmental impacts, and environmental management plans. The US suggested including: the description of activities and reasonable alternatives; potential direct and indirect, individual and cumulative impacts; and mitigation and monitoring measures.

Consultation: AOSIS recommended wide consultations, including adjacent coastal states, indigenous peoples and local communities, and relevant regional and intergovernmental organizations. P-SIDS requested mandatory consultation with adjacent SIDS. IUCN highlighted customary international law requirements on consultation and meaningful participation regarding transboundary impacts, suggesting notifying all states of activities likely to pose SAIs wherever the activity occurs. The EU favored consulting adjacent coastal states and addressing their concerns. AUSTRALIA proposed an obligation, in case of possible transboundary harm, to consult with potentially affected coastal states. MEXICO suggested establishing a consultation process to resolve disputes in a non-adversarial manner.

Transparency: CARICOM emphasized public participation at each stage of the EIA process and publicly available information. P-SIDS supported information-sharing, including across frameworks, and joint EIA submissions by SIDS. MEXICO proposed making EIAs public when they do not contain confidential information. The EU favored making the EIA process transparent through a communication platform.

Monitoring, reporting, and review: The G-77/CHINA highlighted a M&R body within the clearinghouse. The AFRICAN GROUP emphasized the need for compliance and liability provisions. AOSIS stressed that relevant information should be provided to adjacent coastal states. P-SIDS described a review process, requiring alternative measures or a modified process for resubmitting a proposed activity, with the scientific body requesting independent expert panel reviews, and the decision-making body addressing non-compliance issues.

CARICOM highlighted a self-reporting requirement for proponents and sponsoring states, with an evaluation body ensuring compliance and accurate reporting. MEXICO supported monitoring activities and compliance during and after activities. The EU favored requiring parties to monitor effects and ensure compliance with authorizations' conditions.

CHINA emphasized states' role in monitoring, reporting, and review, noting that other bodies may provide advice. CANADA stressed that states will monitor at project level, favoring follow-up and post-monitoring measures. NORWAY highlighted sponsoring states' monitoring duties and the need for transparent reporting. CHILE preferred that the scientific/technical body ascertain the validity of measures proposed and state parties periodically submit M&R reports to a review committee.

MOROCCO underscored that activities within national jurisdiction should not fall under the ILBI, but when an activity in ABNJ impacts adjacent coastal states, these states should be notified for coordination purposes. The US encouraged states to monitor the EIA process and share monitoring-related information.

IUCN called for regular reviews. The HIGH SEAS ALLIANCE supported: procedures for requesting the scientific committee's review of EIAs or decisions not to carry them out; provisions for M&R and regular reporting on actual and anticipated effects of activities for possible adjustment, termination, reparation, and compensation; and requirements for sponsoring states to monitor and report annually to COP.

Strategic Environmental Assessments: The AFRICAN GROUP underscored SEAs addressing broad-level policies. CARICOM supported providing for SEAs in various regions, noting that ISA could provide guidance.

The EU defined SEAs as the formalized, systematic process of identifying and evaluating the environmental consequences of proposed programmes to ensure they are fully included and addressed at the earliest possible stage of decision making. She suggested setting rules and conditions for SEAs to be carried out by states individually and collectively, including via regional cooperation through *ad hoc* or existing regional or global institutions. MEXICO underscored the need to clarify SEA parameters, content, and relationship to EIAs. CANADA supported including SEA provisions, with their scope to be determined on the basis of nature, size, and degree of impact. IRAN supported including SEAs in the ILBI.

The RUSSIAN FEDERATION argued against including SEAs in the ILBI, doubting their viability in ABNJ and their coherence with UNCLOS and RFMOs' mandates. CHINA questioned the kind of policies, plans, and programmes requiring SEAs. The US opposed SEAs as UNCLOS does not require them and it is unclear who should conduct them.

NIGERIA and SENEGAL underscored the importance of SEAs for area-based management tools (ABMTs) and marine protected areas. IUCN highlighted opportunities linked to SEAs for: harmonizing best practice in environmental assessments across regions; enhancing cross-sectoral cooperation; and implementing the precautionary and ecosystem approaches, consistency, transparency, inclusiveness, and participation, as well as regular monitoring. WWF underlined: links between SEAs and cheaper and more effective EIAs, guidance for ABMTs, and cost-effective capacity-building and technology-transfer activities; the relevance of biogeographical classifications to identify interests and stakeholders to be included in SEA processes; and possible support from existing expert groups, such as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and the Regular Process. The INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW argued that SEAs foster collaboration among states and engagement of the scientific community.

Definitions: The G-77/CHINA noted that EIAs include the process to evaluate the impacts of activities in ABNJ with effects within and beyond areas of national jurisdiction, taking into account beneficial and adverse, socioeconomic, cultural, and human health impacts. The EU referred to cumulative effects as “impacts on the same ecosystems resulting from different activities or from the repetition of similar activities over time.”

Principles: The G-77/CHINA suggested compliance, reliability, polluter pays principle, public and universal participation, ecosystem-based approach, science-based approach, precautionary approach, transparency in decision making, and inter- and intra-generational equity. AOSIS emphasized SIDS' special circumstances and requirements. CARICOM highlighted public participation and liability. The EU recommended including at least the precautionary principle, science-based approach, and public participation. P-SIDS proposed a fund to support the EIA process, including a contingency rehabilitation fund, in line with the polluter pays principle.

International cooperation: The G-77/CHINA considered EIAs unnecessary when an activity is covered by existing obligations. AOSIS recommended accompanying any obligations arising from EIAs with capacity-building provisions. P-SIDS emphasized facilitating coherent ocean governance and harmonizing environmental standards to ensure equitable decisions and accountability; and supported a global standard-setting body based on the best scientific information, including traditional knowledge, and appropriate proceedings in cases of non-compliance.

Informal Working Group on MGRs

The G-77/CHINA argued that any MGR access within the scope of ILBI should not hamper MSR or prejudice sovereign rights over exclusive economic zones and continental shelves, including extended continental shelves; and suggested a reporting, monitoring, and traceability mechanism to facilitate benefit-sharing, with P-SIDS considering traceability for both commercial and non-commercial uses as existing best practice. The EU supported a non-prejudice clause reflecting due regard to the rights and legitimate interests of coastal states.

Material Scope: NEW ZEALAND proposed referring to agreed provisions on what constitutes genetic resources, such as Article 2 (use of terms) of the International Treaty on Plant Genetic Resources for Food and Agriculture. CARICOM called for open access through a clearinghouse, possibly after a period of two to five years.

Fisheries: The G-77/CHINA and the EU favored distinguishing between fish used as a commodity and as a source of MGRs. ARGENTINA, COLOMBIA, and the EU, opposed including fish as a commodity because specific instruments already regulate them. The PHILIPPINES underscored the Fish Stocks Agreement and the need for a scientifically informed threshold. THAILAND called for “creative ways to deal with this issue,” noting that existing RFMOs have different mandates, implementation and legal gaps, varying performance, limited coordination, incomplete geographical coverage, and limited biodiversity frameworks.

Digital sequence information: The G-77/CHINA and the HOLY SEE, opposed by the REPUBLIC OF KOREA, recommended that the ILBI apply to MGRs *in silico*.

Derivatives: The AFRICAN GROUP, supported by ARGENTINA, BRAZIL, the PHILIPPINES, COLOMBIA, and the HOLY SEE, and opposed by the EU, CHINA, and the REPUBLIC OF KOREA, supported the ILBI application to derivatives, noting that the Nagoya Protocol applies to derivatives and that there is no scientific basis for their exclusion.

Temporal scope: The EU, supported by P-SIDS, proposed applying the ILBI to *in-situ* MGR collection only after entry into force.

Geographical scope: BRAZIL suggested triggering consultation in cases of straddling MGRs. The HOLY SEE suggested focusing on the regulation of MGRs rather than their geographical scope, proposing distinguishing MGRs on the basis of their actual or potential economic value, consistent with UNCLOS and the Convention on Biological Diversity. She suggested that the origin of every patent should be presumed to be in ABNJ unless otherwise stated in patent applications.

In the Corridors

At the halfway point of the meeting, a seasoned participant mused that the most insightful comments on EIAs came from the Facilitator, who coaxed delegates to focus on possible substantive standards for decision-making and the degree of internationalization of EIA processes. “I think we also need more progress on the relationship between EIAs under the ILBI and existing frameworks,” offered another delegate. “At least we have a clearer sense of different options for IGC-2,” added a cautiously optimistic veteran, adding that “after all, EIAs were already more advanced at the PrepCom stage than other elements of the package.” Meanwhile, Bureau discussions continued on how to address “unfinished business” on ABMTs before IGC-1 ends.



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