

BBNJ IGC-2 Highlights:

Monday, 1 April 2019

The second Intergovernmental Conference (IGC-2) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) convened on Monday, 1 April 2019 in an informal working group to discuss environmental impact assessments (EIAs).

Environmental Impact Assessments

General Comments: The HIGH SEAS ALLIANCE and the INTERNATIONAL CABLE PROTECTION COMMITTEE (ICPC) favored outlining the steps for conducting an EIA. The ICPC preferred that activity proponents take responsibility for determining whether an EIA is required. The INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW (ICEL) reflected on biotechnology-related activities in ABNJ and advocated drawing from the Convention on Biological Diversity (CBD).

Process: On public notification and consultation, the HIGH SEAS ALLIANCE favored these taking place with states, international organizations, and the public. The ICPC preferred a time-bound period and supported inclusion of confidentiality provisions.

On decision-making, the HIGH SEAS ALLIANCE preferred that a review and recommendation from a scientific/technical body be required prior to a state's decision if the proposed activity is expected to exceed the threshold, even though that state is responsible for approving the activity.

On monitoring and review, the EU and others noted the difference between monitoring under an EIA process, and general monitoring, reporting, and review, underlining that the former section implies observing, measuring, evaluating, and analyzing by recognized scientific methods, while the latter refers to keeping under surveillance.

Content: The EU, with the LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, and CHINA, supported streamlining the text. The US said that non-binding, indicative, further guidance could be developed by future bodies.

The G-77/CHINA, the AFRICAN GROUP, the EU, CARICOM, P-SIDS, the LIKE-MINDED LATIN AMERICAN COUNTRIES, and others supported detailing the required content of an EIA. The RUSSIAN FEDERATION cautioned that the language is too detailed. FAO warned against burdensome requirements for developing countries, and ICPC against lengthy EIA review processes.

The AFRICAN GROUP, the EU, CARICOM, P-SIDS, NORWAY, CHINA, MONACO, and NEW ZEALAND supported requiring a description of planned activities, with the AFRICAN GROUP, INDIA, INDONESIA, ERITREA, and CANADA recommending also including the purpose of the activity, and CARICOM its location. The US, ERITREA, and CANADA requested clarification on the distinction between "planned" and "proposed" activities. The AFRICAN GROUP, the EU, P-SIDS, NORWAY, CANADA, INDONESIA, and the US supported including a description of reasonable alternatives to planned

activities, while CARICOM, INDIA, and FSM supported this "where appropriate."

Under descriptions of impacts, the EU, P-SIDS, the US, INDIA, NORWAY, INDONESIA, CANADA, and the AFRICAN GROUP supported describing effects, including cumulative and transboundary impacts, with SWITZERLAND noting other impacts could be included. The AFRICAN GROUP, NORWAY, MONACO, CHINA, and the PHILIPPINES supported including socio-economic impacts, with the US and AUSTRALIA opposing. HOLY SEE underscored the need to consider the proponent's financial and social responsibility.

CARICOM recommended including "potential social, economic, and cultural" impacts, as well as, with INDONESIA, an estimation of their significance. NIGERIA noted the description of impacts could include consideration of reasonably foreseeable potential impacts and alternatives.

The EU, NORWAY, the US, and NEW ZEALAND requested clarification regarding the need for the description of a "worst-case scenario."

On impact mitigation measures, the AFRICAN GROUP, the EU, CANADA, NORWAY, MONACO, AUSTRALIA, the PHILIPPINES, CHINA, and NEW ZEALAND supported a description of any measures for "avoiding, preventing, and mitigating impacts"; while CARICOM, P-SIDS, ERITREA, FSM, and NIGERIA supported a description of measures for avoiding, preventing, mitigating, and redressing pollution or harmful changes to the marine environment. INDIA suggested combining the two options. INDONESIA supported a description of alternatives and measures. The US suggested drawing from the Protocol on Environmental Protection of the Antarctic Treaty.

The US and NORWAY did not support references to contingency plans and, with CANADA, environmental records, or business plans.

The EU, CARICOM, P-SIDS, NEW ZEALAND, the PHILIPPINES, and NIGERIA supported developing further details on the required content of an EIA, with P-SIDS proposing the inclusion of traditional knowledge.

INDONESIA and ERITREA suggested the ILBI develop further details. CANADA favored an annex to allow for a lighter amendment process.

Monitoring, Reporting and Review: HOLY SEE called for provisions for emergency measures suggesting, *inter alia*, a due diligence provision to protect states from liability if they adopt a legal framework to reasonably secure compliance.

On monitoring, many supported states parties ensuring impacts of activities in ABNJ are "monitored, reported, and reviewed," consistent with UNCLOS Articles 204 (risk monitoring), 205 (publication of reports) and 206 (assessment of potential effects). The REPUBLIC OF KOREA stressed that monitoring and reporting take place in accordance with monitoring and management plans contained in the EIA reports. JAPAN emphasized that a simple provision that monitoring and review should be conducted in accordance with Article 204 and 205 would suffice. CANADA recommended deleting reference to UNCLOS Articles.

The LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, INDIA, the PHILIPPINES, NEW ZEALAND, INDONESIA, HOLY SEE, and P-SIDS supported that states parties submit reports of monitoring and review to the scientific/technical body. Concurring, the AFRICAN GROUP and CARICOM also suggested reporting by relevant regional and sectoral organizations; and, with INDIA, supported a non-adversarial consultation process to resolve monitoring controversies. INDONESIA suggested reference to “differences” rather than “controversies.” SINGAPORE emphasized that the clearinghouse mechanism can perform similar functions and the HIGH SEAS ALLIANCE supported this mechanism if it is open and transparent.

NORWAY, AUSTRALIA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, CHINA, and the US did not support a non-adversarial consultation process. HOLY SEE suggested “conciliation” as opposed to “non-adversarial.” CARICOM called to delete a reference to judicial or non-judicial bodies regarding conflict resolution. NEW ZEALAND noted that dispute resolution is a cross-cutting issue.

On compliance, the AFRICAN GROUP, IRAN, the PHILIPPINES, and INDONESIA suggested that a compliance committee review reports, and that the decision-making body receive non-compliance reports. The EU, with many others, argued that compliance should be taken up under cross-cutting issues. The US and JAPAN emphasized that compliance should be discussed after agreeing on an EIA regime.

On involvement of other states, the US proposed a time-bound comment period during scoping and drafting that would cover all concerned stakeholders. INDIA, CANADA, IRAN, and CARICOM argued that all states be kept informed, with CARICOM specifying “all states, in particular adjacent coastal states.” INDONESIA and the PHILIPPINES suggested consulting adjacent coastal states and SIDS, and, with P-SIDS, supported “active consultation.” PNG also favored a system of prior notification with adjacent coastal states with a continental shelf, including those that have made relevant submissions to the Commission on the Limits of the Continental Shelf (CLCS).

SINGAPORE stressed that results of the monitoring and review process must be published, noting that the clearinghouse can collate such information.

The EU, NEW ZEALAND, and AUSTRALIA suggested that this issue be covered under the EIA process. The LIKE-MINDED LATIN AMERICAN COUNTRIES proposed moving this section to the general provisions. The AFRICAN GROUP and CHINA suggested deleting the section.

Strategic Environmental Assessments (SEAs): The G-77/ CHINA preferred postponing discussions on this issue, while the LIKE-MINDED LATIN AMERICAN COUNTRIES and the REPUBLIC OF KOREA called for clarifying the scope of SEAs.

The RUSSIAN FEDERATION and the US underscored that SEAs were developed for areas under national jurisdiction.

SWITZERLAND and NORWAY favored setting out rules and conditions for conducting SEAs. CANADA noted that SEAs provide a means of identifying cumulative impacts. NIGERIA supported developing thresholds and criteria to determine activities requiring SEAs. HOLY SEE said SEAs should be considered under ABMTs, adding that rules and conditions should not be specified.

The AFRICAN GROUP, the EU, and P-SIDS supported each party ensuring that SEAs are carried out for plans and programmes under their jurisdiction or control, which affect ABNJ. NEW ZEALAND supported the EU proposal for SEAs to be conducted individually or collectively. AUSTRALIA pointed to efficiencies gained in considering SEAs for multiple activities in the same geographical areas, by multiple actors to inform ABMTs.

ERITREA preferred that SEAs only apply to plans and programmes affecting ABNJ and suggested deleting reference to “states’ jurisdiction and control.”

WWF highlighted SEAs as a tool for marshalling information to support integrated ocean management and facilitating CB&TT.

The HIGH SEAS ALLIANCE emphasized: the need for SEAs for activities in relevant regional sectors; the need to “future proof”

SEAs; and that the scientific body could carry out SEAs where necessary.

Activities requiring an EIA: On thresholds and criteria, the AFRICAN GROUP, CHINA, and JAPAN preferred states parties assessing the potential effects that fall under a “more than minor or transitory effect” on the marine environment. CANADA noted that this option could also include a set of criteria and thresholds. P-SIDS, CARICOM, the REPUBLIC OF KOREA, and the PHILIPPINES preferred progressing from an initial EIA to a comprehensive EIA as states determine reasonable grounds to consider negative impacts.

The LIKE-MINDED LATIN AMERICAN COUNTRIES, the US, NORWAY, AUSTRALIA, NEW ZEALAND, and INDIA supported states parties assessing effects if they have reasonable grounds for believing that these activities may cause substantial pollution or significant and harmful changes to the marine environment. The EU proposed a list of criteria to measure the threshold and suggested that a subsidiary body could guide this process.

HOLY SEE suggested that planned activities that may have substantive negative impacts to marine biodiversity be subject to EIAs.

The US clarified that planned activities are those where the state party exercises effective control or jurisdiction in the form of licensing or funding. NORWAY emphasized the need to address the relationship between the flag and the proponent states.

On activities that require or do not require an EIA, P-SIDS, the LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, and others favored an indicative, non-exhaustive list in an annex. The US suggested developing lists of activities that normally meet the relevant thresholds and thus require an EIA, and those that do not. The PHILIPPINES supported that the list be regularly updated. The REPUBLIC OF KOREA supported preparing voluntary guidelines. The AFRICAN GROUP, AUSTRALIA, NEW ZEALAND, and the EU noted that the development of a list would be burdensome. NORWAY noted that the threshold could be used to determine which activities require EIAs. CHINA noted that each item would require a case-by-case analysis.

On cumulative impacts, the EU, JAPAN, NORWAY, and the LIKE-MINDED LATIN AMERICAN COUNTRIES favored considering these impacts. CARICOM favored a set of guidelines, with CANADA noting that they could be developed at a later stage and included in an annex. PNG, with FSM, called to include climate change impacts.

On transboundary impacts, the EU suggested a provision whereby impacts on ABNJ would be taken into account in EIAs for activities undertaken within the scope of the ILBI. HOLY SEE recommended including foundational text in the ILBI regarding cumulative and transboundary effects.

On ecologically or biologically significant areas (EBSAs) or vulnerable ecosystems, the AFRICAN GROUP, CHINA, AUSTRALIA, the RUSSIAN FEDERATION, NEW ZEALAND, and the EU preferred not defining thresholds. The US, NORWAY, and CANADA did not support a double set of standards. CARICOM and P-SIDS favored special provisions for EBSAs or vulnerable areas.

In the Corridors

On Monday, delegates swung swiftly back into work mode, re-energized by the weekend break. In EIA discussions, conceptual murkiness and conflict remained regarding monitoring, reporting and review, and strategic environmental assessments. There was a general acceptance of the utility of SEAs, but views diverged on how they would apply to areas beyond state control, and who would conduct them.

Taking a more buoyant approach, one delegate pointed to a third way: that the ILBI might consider inviting the COP, or whatever decision-making body is agreed, to develop EIA rules and procedures at a later stage. This was the case for the Espoo Convention, which sets out the obligations of parties to assess the environmental impact of certain activities at an early stage of planning—providing an effective “hook” for recalcitrant parties.