

BBNJ IGC-3 Highlights:

Tuesday, 20 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 for a second day on Tuesday, 20 August 2019. Delegates met in two sessions of closed-door “informal-informals” to discuss aspects of capacity building and the transfer of marine technology (CB&TT), and area-based management tools (ABMTs). They also met in an informal working group.

Report from Closed Informal-Informals

CB&TT: In the afternoon, IGC President Lee offered a brief summary of the informal-informals held during the morning, focusing on CB&TT modalities. She highlighted, *inter alia*, that participants: expressed diverging views in favor of CB&TT being provided on a voluntary or mandatory basis; elaborated on the circumstances under which CB&TT would be voluntary and mandatory respectively; and exchanged opinions about “what we are trying to achieve here” and whether the new treaty should reflect or go beyond “what is in UNCLOS.”

She further noted different opinions on whether to: retain the reference to “development” and transfer of marine technology; address the transfer of marine technology under mutually agreed terms (MAT) or under “fair and most favorable terms, including on concessional and preferential terms”; refer to “carrying out” or “promoting” the development and transfer of marine technology; and retain a definition of marine technology.

Informal Working Group

Cross-Cutting Issues: Relationship with other instruments, frameworks, and bodies: On the title, the G-77/CHINA, supported by the EU, the LIKE-MINDED LATIN AMERICAN COUNTRIES, INDONESIA, NEW ZEALAND, and several others, proposed deleting the reference to “other existing” instruments, to avoid prejudicing future instruments. NIGERIA suggested adding a reference to “subregional” instruments.

The AFRICAN GROUP proposed deleting a reference to the ILBI “not prejudicing the rights, jurisdiction, and duties of states under the Convention,” questioning how the agreement could be implemented, notably with regard to ABMTs, without conflicting with a number of rights, such as on those on navigation. The EU, with CANADA, AUSTRALIA, and JAPAN opposed the deletion. NEW ZEALAND, with NAURU, suggested that a stand-alone article be designated for the rights of coastal states.

COLOMBIA, opposed by many, suggested deleting the specification of the continental shelf within and beyond 200 nautical miles and the exclusive economic zone (EEZ).

MEXICO favored, opposed by many, deleting bracketed text noting that the agreement should “respect the competences of” other bodies. CANADA, with NORWAY and the REPUBLIC OF KOREA, proposed respecting the “mandate and competences of other bodies.” SWITZERLAND proposed that the agreement provide for mutual support of relevant bodies.

ECUADOR proposed adding that the designated secretariat promote coordination mechanisms with other bodies. The IMO suggested adding a “no more favorable clause,” to ensure that non-party ships do not gain a competitive economic advantage by not being party to the ILBI.

MEXICO, the RUSSIAN FEDERATION, the EU, the AFRICAN GROUP, ICELAND, AUSTRALIA, and the IMO suggested deleting a provision that relevant instruments should be “supportive of and not run counter to the objectives of the Convention and the ILBI,” with the HIGH SEAS ALLIANCE noting that this would give precedence to the ILBI.

CB&TT: Objectives: The EU, with CANADA, suggested that the chapeau reference that CB&TT shall be aimed at states parties, in particular developing states parties, in implementing provisions of the ILBI. P-SIDS, with BANGLADESH, CARICOM and MALDIVES, suggested a more general provision to promote capacity building for states that need assistance, particularly developing states.

The G-77/CHINA preferred ensuring access to technology by the transfer of marine technology, while JAPAN, the US, NORWAY, and the RUSSIAN FEDERATION supported “promoting and encouraging” this access.

NEW ZEALAND, with AUSTRALIA, NORWAY, and the US, opined that reference to peaceful purposes is unnecessary in this section. The AFRICAN GROUP highlighted that the relevant UNCLOS provision does not include MGRs.

CARICOM proposed including reference to the “equitable” participation of developing countries under the ILBI as well as extending knowledge dissemination and also developing technological capacities in areas within national jurisdiction.

HONDURAS, opposed by the G-77/CHINA, suggested deleting reference to strategic environmental assessments (SEAs).

The G-77/CHINA expressed support for text on access to, and benefits from, the scientific information resulting from access to resources in ABNJ, in particular MGRs, requesting to also refer to the “utilization” of resources. JAPAN noted that mineral resources in the Area fall under the jurisdiction of the ISA.

On access to MGRs *in situ*, *ex situ*, *in silico*, and digital genetic sequence data and information, CHINA requested retaining reference to MGRs *in situ*; INDIA preferred retaining reference to MGRs *in situ*, *in silico*, and digital sequence information; and P-SIDS requested retaining reference to them all.

The G-77/CHINA favored a reference to “endogenous” research capabilities relating to MGRs and products, processes, and other tools. P-SIDS called to also refer to “local” capabilities.

The EU urged moving references to the implementation of CB&TT to the chapeau of the article and, supported by CANADA, proposed shortening the paragraph to note that CB&TT shall contribute to support the implementation of the MGR provisions established by the ILBI, and to retain only the provisions on ABMTs and MPAs, and EIAs and SEAs. The US, with SWITZERLAND, AUSTRALIA, and the RUSSIAN FEDERATION, requested deleting the whole paragraph, noting that it includes details that should be dealt with elsewhere in the ILBI.

Cooperation: JAPAN, the REPUBLIC OF KOREA, and NIGERIA stressed that states parties shall “promote” cooperation in accordance with their capabilities, with NORWAY and the EU preferring cooperation “in accordance with the Convention.” AUSTRALIA and TUVALU suggested “in accordance with the Agreement and member states’ capabilities.” TUVALU preferred that states parties shall “ensure” cooperation. The US suggested cooperation take place in a manner “consistent with Part XIV of the Convention,” with the EU querying the specific mention of Part XIV (development and transfer of marine technology), and SAINT LUCIA, HONDURAS, SRI LANKA, and TOGO requesting its deletion. Reiterating that cooperation shall be on a strictly voluntary basis, the RUSSIAN FEDERATION did not support the descriptions of legal obligations.

JAPAN and NORWAY preferred that CB&TT be “promoted,” and the G-77/CHINA and others that it should be “carried out” through enhanced cooperation. The G-77/CHINA and others proposed including cooperation “in all forms, including partnerships with stakeholders, such as industry and the private sector.” JAPAN, supported by the REPUBLIC OF KOREA and CANADA, requested deleting reference to cooperation with industry and the private sector.

The EU favored enhanced cooperation at all levels with the active participation of competent organizations and involving all relevant stakeholders, including, where appropriate, the private sector, civil society and, with TUVALU, holders of traditional knowledge. The RUSSIAN FEDERATION stressed that specific forms or modalities of cooperation will be covered by a reference to voluntary cooperation based on MAT. SWITZERLAND also preferred voluntary technology transfer based on MAT. BANGLADESH expressed skepticism on voluntary provisions for technology transfer.

On the full recognition of the special requirements of developing states parties, the G-77/CHINA and others supported reference to the duty to “cooperate,” while the US and the REPUBLIC OF KOREA favored to “promote cooperation.” AOSIS suggested that the text should “take into account the different needs of states parties, including, in particular, the special circumstances of SIDS,” with AUSTRALIA; proposed including an additional article to address the special circumstances of and take into account the capacity constraints of SIDS in relation to CB&TT; and favored including a paragraph to “ensure” that SIDS are not disproportionately burdened by the ILBI. The US and CANADA, opposed by the G-77/CHINA, proposed deleting the reference to middle-income countries. The AFRICAN GROUP, with NICARAGUA, expressed preference for CB&TT to be “carried out” through enhanced cooperation; and requested deleting the references to specific forms of cooperation, especially noting that South-South cooperation is voluntary.

The EU proposed referring to the special requirements of developing states consistent with this agreement.

Modalities: The G-77/CHINA suggested deleting: reference to CB&TT not duplicating existing programmes, opposed by the US, the REPUBLIC OF KOREA, NORWAY, and SWITZERLAND; and, with the LIKE-MINDED LATIN AMERICAN COUNTRIES and NORWAY, being an effective, iterative process that is participatory, cross-cutting, and gender-responsive. The EU proposed that CB&TT shall be transparent, needs-driven, consistent with the objectives

of the ILBI and not duplicate existing programmes. He opined that references to a participatory approach and gender-responsiveness should be retained.

Stressing that reference to “mandatory” CB&TT is meant to create a legal obligation, the G-77/CHINA proposed that CB&TT: shall be based on, and be responsive to, the needs and priorities of developing states parties as determined by a needs assessment on an individual case-by-case or regional basis, with NORWAY, P-SIDS, and CARICOM; and detailed modalities for CB&TT shall be developed and adopted by the Conference of the Parties (COP) within one year of the ILBI’s entry into force. SWITZERLAND, supported by AUSTRALIA, requested clarification as to how an assessment mechanism established by the COP would work.

The EU emphasized that all states parties could potentially be able to benefit from CB&TT provisions related to conservation and sustainable use, stressing that CB&TT modalities should be discussed by the COP. Noting that not all developing states parties will be recipients of CB&TT, the US requested referring to “recipient” developing states parties. AUSTRALIA drew attention to the need for flexibility regarding states’ capacity to provide CB&TT.

The US, with the REPUBLIC OF KOREA, said CB&TT “should” be guided by lessons learned. P-SIDS opposed only referring to “existing” legal instruments. CARICOM, with P-SIDS, supported referencing lessons learned by subregional bodies.

The EU, with the US, suggested that the COP “may determine to develop” detailed modalities, procedures, and guidelines, rather than be mandated to do so. The US preferred only referring to guidelines. The G-77/CHINA, with the REPUBLIC OF KOREA, proposed that the COP be mandated to develop these modalities within a clear timeframe. ICEL suggested that an advisory body help to determine procedures and guidelines.

The REPUBLIC OF KOREA suggested addressing the current provisions in future guidelines. JAPAN proposed deleting the entire paragraph due to lack of consensus on the nature of CB&TT.

In the Corridors

More than 15 years into the negotiations on an international legally binding instrument for the conservation and sustainable use of BBNJ, the Conference moved into a more direct, albeit less open, working mode, to hammer out the details of a new High Seas treaty. The informal-informals, announced during IGC-2, kicked off in earnest, with two, two-hour sessions, focusing on certain aspects of CB&TT, and specific elements related to ABMTs. Limiting participation to a few observers from intergovernmental and non-governmental organizations, not including the Reporting Services, attracted mixed feelings on both sides of the closed doors.

On the one hand, some delegates found the new format refreshing. “This allows a frank exchange of opinions; much better than the infertile reiteration of entrenched positions we keep hearing in plenary settings.” On the other hand, others voiced evident concerns. Some delegates opined that it is difficult to discern the level of progress in the process. “For the last eight years, each meeting feels like Groundhog Day,” quipped a delegate, pointing to what she perceived as limited progress since the adoption in 2011 of the “package” of issues to be addressed in this process. Others expressed concern over the negotiating modalities as they stand. “Limiting participation at a time where transparency and public engagement have become a central tenet across the political spectrum is not a step in the right direction,” one participant lamented, adding that “sacrificing transparency for possible expediency better deliver on the expediency side, otherwise it will be hard to justify to future generations.” Yet another participant offered a more philosophical approach: “Hearing the arguments on expediency, I want to give the closed-door negotiations a chance to deliver the long-awaited result. Still, ultimately, we will have to answer as to whether this end really justifies the means.”