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BBNJ IGC-3 Highlights: Friday, 23 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 on Friday, 23 August 2019, in an informal working group on marine genetic resources (MGRs), including questions on benefit-sharing. Delegates also met in two closed-door "informal-informals" to discuss MGRs, and environmental impact assessments (EIAs).

The Conference adopted an amended programme of work (A/CONF.232/2019/8/rev), revising the schedule for the second week of negotiations.

Report from Closed Informal-Informals

MGRs: Facilitator Janine Coye-Felson (Belize) provided an overview of the discussions that took place on Wednesday and Thursday, focusing on access to MGRs and benefit-sharing. She highlighted that delegates had stressed the link between provisions on access and on benefit-sharing, proposing streamlined text. Regarding access to MGRs, Coye-Felson highlighted differing views on: the definition, with some preferring not defining access at all; regulation modalities, with delegates opting for, *inter alia*, free and unimpeded access, or access, subject to prior notification or a licensing system; applicability regarding MGRs *ex situ* and *in silico*; and provisions calling for states parties to take the necessary measures to facilitate access. She noted general support that the consent of coastal states would not be required in cases where activities in areas beyond national jurisdiction (ABNJ) may result in the utilization of MGRs found in areas within national jurisdiction, but opinions differed on the need for notification and consultation.

Opinions differed on: the qualifiers of benefit-sharing; activities triggering benefit-sharing; the voluntary or mandatory nature of benefit-sharing; and obligations of states parties related to measures to ensure that the benefits arising from traditional knowledge are shared with indigenous peoples and local communities. Coye-Felson highlighted some support for a provision that states parties shall take the necessary measures to ensure that benefits are shared.

Informal Working Group on MGRs, including benefit-sharing

Objectives: The EU, supported by ICELAND, SWITZERLAND, the RUSSIAN FEDERATION, and the REPUBLIC OF KOREA, reiterated that the objective of the international legally binding instrument (ILBI) should be the conservation and sustainable use of BBNJ.

The G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, NORWAY, and the PHILIPPINES suggested restructuring the objectives to highlight the importance of "ensuring the fair and equitable sharing of benefits arising from the utilization of MGRs of ABNJ." P-SIDS, INDONESIA, and the PHILIPPINES strongly supported reference to "fair and equitable" benefit-sharing, opposed by the REPUBLIC OF KOREA and JAPAN.

The EU proposed "promoting the sharing of benefits arising from the collection of MGRs of ABNJ in accordance with this part." INDONESIA supported also referring to benefit-sharing arising from "access" to MGRs, in addition to utilization. The US called for deleting the reference to benefit-sharing arising from "utilization."

On a provision promoting the generation of knowledge and technological innovations, the LIKE-MINDED LATIN AMERICAN COUNTRIES, opposed by the US, requested deleting a reference that this be done "in accordance with the Convention." P-SIDS suggested this be done in accordance with states parties' technological capabilities. CARICOM proposed promoting the generation "and sharing" of information.

On a provision on building developing states parties' capacity to access and utilize MGRs of ABNJ, the EU suggested "building the capacity of states parties that might need and request technical assistance to conserve and access MGRs of ABNJ." SWITZERLAND requested opening the provision on capacity building to all states, in particular developing states parties. IRAN and others urged, opposed by the US, retaining the reference to middle-income countries as a developing-country category. The PHILIPPINES proposed including "environmentally vulnerable states" in the list, with INDONESIA adding archipelagic states. NORWAY, with SWITZERLAND, AUSTRALIA, and the REPUBLIC OF KOREA, proposed moving this provision to Part V on capacity building and the transfer of marine technology.

The G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, the EU, ICELAND, NORWAY, and others proposed moving a provision on promoting the development and transfer of marine technology to Part V. P-SIDS suggested "facilitating" or "ensuring" rather than promoting the transfer of marine technology. IRAN, opposed by CHINA, suggested deleting language referencing the development and transfer of technology "subject to all legitimate interests, including, *inter alia*, the rights and duties of holders, suppliers, and recipients of marine technology." SWITZERLAND and the US noted technology transfer should be done on a voluntary basis and on mutually agreed terms.

The G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, P-SIDS, and others suggested moving a provision on contributing to the realization of a just and equitable international economic order to the ILBI preamble. The EU, NORWAY, SWITZERLAND, the US, AUSTRALIA, the REPUBLIC OF KOREA, and JAPAN requested its deletion.

The RUSSIAN FEDERATION proposed alternative language for the article, including on promoting marine scientific research (MSR) in order to build knowledge on MGRs and equal rights in their use.

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Application of the provisions: ***Title***: NORWAY supported that the title read: "Application of the provisions of this Part." The G-77/CHINA, the AFRICAN GROUP, P-SIDS, CARICOM, CUBA, THAILAND, and ECUADOR preferred that the provisions apply to the "Agreement."

Geographic scope: The LIKE-MINDED LATIN AMERICAN COUNTRIES, with JAPAN, NORWAY, CANADA, SINGAPORE, SRI LANKA, and ICELAND, preferred the provisions apply to MGRs "accessed" in ABNJ, noting the difficulty of determining the origin of MGRs. The EU, the RUSSIAN FEDERATION, AUSTRALIA, and the US preferred MGRs "collected in" ABNJ. The AFRICAN GROUP and P-SIDS expressed preference for "accessed in and originating from," while CARICOM supported MGRs "of, accessed in, and originating from ABNJ." INDONESIA proposed that the provisions shall apply to MGRs "of ABNJ."

The LIKE-MINDED LATIN AMERICAN COUNTRIES, the AFRICAN GROUP, CARICOM, and P-SIDS noted the need to conclusively define access.

Material scope: P-SIDS supported a provision to include "fish, insofar as they are collected for the purposes of being the subject of research into their genetic resources" and "genetic information." The LIKE-MINDED LATIN AMERICAN COUNTRIES, supported by CARICOM, proposed language to apply the ILBI to MGRs accessed for the purposes of "conducting activities related to their genetic composition and their derivatives, including research into their genetic and biochemical properties," with some delegates stressing that provisions related to fish should go beyond MSR. SWITZERLAND opined that the ILBI: shall apply to MGRs with the understanding that they are physical material and they also include fish genetic resources; and shall not apply to derivatives, supported by CANADA, the US, ICELAND and CHINA, and digital sequence information (DSI), with NEW ZEALAND, AUSTRALIA, ICELAND, and others.

The AFRICAN GROUP, P-SIDS, INDONESIA, THAILAND, the PHILIPPINES, CUBA, and others suggested: including fish insofar as they are collected for their genetic properties, and MGRs collected *in situ, ex situ, in silico*, derivatives, and DSI. ECUADOR stressed that if a fish species is determined to have value for its genetic material, it should be treated as an MGR and trigger coordination with global, regional, or sectoral bodies, including for conducting the necessary relevant stock analyses.

The US and ICELAND opposed a threshold to determine whether fish is considered a commodity or an MGR, with SINGAPORE, and proposed referring to the "taking" instead of the "using" of fish. AUSTRALIA noted the provision should not apply when genetic material of fish is collected for the purpose of fisheries management. The EU, SINGAPORE, the PHILIPPINES and CUBA said the ILBI should apply to fish used for MSR.

The FOOD AND AGRICULTURE ORGANIZATION OF THE UN (FAO) suggested carefully treating references to thresholds and referring to "fisheries resources" rather than "fish and other biological resources." The HIGH SEAS ALLIANCE proposed referring to "biological resources as a commodity," noting problems with defining fish, including in the 1995 Agreement. The INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW suggested focusing on an activity-based approach, rather than on different forms of MGRs.

Exclusions to application: The LIKE-MINDED LATIN AMERICAN COUNTRIES, with IRAN, proposed that the ILBI shall not apply to "the use of fish and other biological resources from fishing operations and related activities," clarifying, supported by CARICOM, that it considers that fish, when used for its genetic resources and other properties, would fall within the ILBI, but that fisheries and related activities would not.

The RUSSIAN FEDERATION, NORWAY, JAPAN, ICELAND, and NEW ZEALAND supported that the provisions should not apply to fish or other biological resources as a commodity, with NEW ZEALAND cautioning against creating loopholes in existing fisheries management. The EU reserved its position on fish, stating that fisheries management falls outside the scope of the ILBI.

CHINA proposed that the agreement not apply to "the use of fish and other marine living resources as the catch of fishing or for fishing, including fishing for commercial profit, living, sport or recreation, and the relative activity including MSR for fishing." ICELAND suggested requesting an FAO working group to provide clarification on the definition of "fish as a commodity."

CANADA and SINGAPORE queried terminology around MGRs *in silico* and DSI as well as the practicality of grouping different types of MGRs together.

Temporal scope: SWITZERLAND, NORWAY, CANADA, NEW ZEALAND, INDONESIA, AUSTRALIA, the US, ICELAND, and CHINA noted that the provisions shall apply to MGRs collected after the ILBI's entry into force. CHINA requested clarification on whether entry into force refers to the date of ratification or accession. The AFRICAN GROUP, P-SIDS, and SRI LANKA emphasized that when MGRs have been collected before the entry into force of the ILBI, but utilized for a commercial purpose after the entry into force, the provisions should, where relevant, apply. JAPAN suggested moving the provision on retroactivity to the general provisions.

SWITZERLAND, supported by the US, offered to replace the whole article, noting that "the provision of this part applies to MGRs collected *in situ* in ABNJ after the entry into force of this agreement." The EU proposed applying the provisions to MGRs "collected in ABNJ after the entry into force of this agreement for the respective party," and deleting the specific provision on retroactivity. The REPUBLIC OF KOREA supported streamlining the article.

In the Corridors

On Friday, delegates had an open discussion on one of the most contentious parts of the package: marine genetic resources, including questions on benefit-sharing. Walking into plenary, one delegate commented on the slick strategy of leaving "the big work for us to consider over the weekend," recalling the hardline positions on this issue over the years. As they delved into the discussions, it came as no surprise that there was little movement on the scope of the new High Seas treaty related to MGRs, with now-familiar discussions on the importance, or not, of ensuring the treaty covers fisheries resources, digital sequencing information, or derivatives. Addressing both the geographical and material scopes of the agreement attracted a variety of opinions, with an observer noting that "despite progress, we still have quite a long way to go to reach consensus." Some convergence of opinions appeared on the temporal scope, with disagreements around whether MGRs collected before the entry into force of the agreement, but utilized after it, should be subject to the provisions.

As delegates made their way to the closed-door sessions, one seasoned observer reflected on the need for compromises: "The thing to keep in mind is that no one is going to be totally pleased with the final outcome." Another delegate was more hopeful that negotiations could conclude within the stipulated four sessions, alluding to "at least some progress in the informals." He stated: "We are more than ready to enter the compromise-making stage of the negotiations and make miracles happen."

Delegates left for the day, planning to do lots of homework over the weekend, as well as attend a couple of interesting workshops, which could provide information and, crucially, language to bridge the chasms that still exist in the negotiations. With the second week scheduled to incorporate more parallel sessions, both open and closed, to get through the various texts in circulation, one participant offered that, with the increased tempo, "time will just fly by."