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BBNJ IGC-3 Highlights: Wednesday, 28 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 in two informal working groups on marine genetic resources (MGRs), including benefit-sharing questions, and on cross-cutting issues. Delegates also met in "informal-informals" to discuss aspects related to area-based management tools (ABMTs), including marine protected areas (MPAs), and environmental impact assessments (EIAs).

Report from Informal-Informals

MGRs: Informal Working Group Facilitator Janine Coye-Felson summarized discussions on monitoring and intellectual property rights (IPRs) with respect to MGRs. Regarding monitoring, Coye-Felson highlighted that many supported a robust track-and-trace mechanism, while others cautioned against impeding marine scientific research (MSR). She highlighted divergent views on: the type of activities subject to monitoring; the feasibility and desirability of a proposed identification and notification system; and the entity responsible for reviewing the submitted reports.

On IPRs, Coye-Felson highlighted different views on whether the international legally binding instrument (ILBI) should address IPRs or not, with some emphasizing traceability and compliance, while others suggesting that competent bodies, such as the World Intellectual Property Organization or the World Trade Organization, address the issue.

Cross-cutting issues: IGC President Rena Lee, as facilitator of the informal working group on cross-cutting issues, summarized Monday's work in the "informal informals" on funding. She noted some convergence of views on: providing funding through a range of sources; recognizing the special circumstances of groups of countries; and establishing a voluntary trust fund to facilitate the participation of representatives of developing states parties. Opinions diverged, *inter alia*, on: whether funding should be voluntary or include mandatory requirements, with some noting that funding provisions are contingent upon the substantive ones; and the modalities and uses of a potential special fund.

Informal Working Group on MGRs, including benefit-sharing

Activities with respect to MGRs: ***Scope***: Noting that activities with respect to MGRs of areas beyond national jurisdiction (ABNJ) may be carried out by all states, the G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, P-SIDS, and SWITZERLAND requested deleting a reference giving "due regard for the rights, obligations, and interests under UNCLOS." The US proposed reflecting the rights, obligations, and interests of other states. The LIKE-MINDED LATIN AMERICAN COUNTRIES suggested referring to activities with respect to MGRs "accessed in" ABNJ.

The EU suggested "including all states, irrespective of their geographical location, and competent international organizations," and, opposed by the G-77/CHINA, the AFRICAN GROUP, and CARICOM, referring to MSR activities with respect to MGRs of ABNJ. SRI LANKA and others cautioned against limiting the scope to MSR. P-SIDS and the AFRICAN GROUP suggested reference to UNCLOS Article 241 (non-recognition of MSR as the legal basis for claims).

NORWAY, AUSTRALIA, NEW ZEALAND, and JAPAN suggested deleting the provision. AUSTRALIA and the REPUBLIC OF KOREA cautioned against undermining MSR provisions. SWITZERLAND and JAPAN queried the meaning of the term "activities." The RUSSIAN FEDERATION did not support the selective quoting of UNCLOS provisions.

MGRs of ABNJ and within national jurisdiction: SWITZERLAND, CHINA, the RUSSIAN FEDERATION, NORWAY, the US, the REPUBLIC OF KOREA, and JAPAN proposed deleting this provision. P-SIDS, with the LIKE-MINDED LATIN AMERICAN COUNTRIES, and many others supported retaining the provision, specifically to account for transboundary issues.

SINGAPORE, opposed by the RUSSIAN FEDERATION, proposed that in cases where MGRs are found in both ABNJ and within national jurisdiction, states "shall endeavor to cooperate, as appropriate, with any coastal states." CHINA opposed additional rights for coastal states in ABNJ.

Sovereignty: The G-77/CHINA supported retaining the provision preventing states from claiming, exercising, or appropriating sovereignty or sovereign rights over MGRs of ABNJ. Favoring

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deletion, JAPAN, supported by the REPUBLIC OF KOREA, the RUSSIAN FEDERATION, and ICELAND, emphasized that UNCLOS Article 137 (legal status of the Area and its resources) only applies to mineral resources in the Area. The US and AUSTRALIA noted that the text implies that MGRs of ABNJ fall under the common heritage of humankind.

The AFRICAN GROUP pointed to a study on the relationship between the Convention on Biological Diversity (CBD) and UNCLOS on deep seabed genetic resources, recalling that, during the establishment of the regime, these resources were largely unknown. P-SIDS, supported by the PHILIPPINES, proposed also requiring the prior consent of concerned coastal states when activities with respect to MGRs of ABNJ may affect them.

Uses and purposes: The G-77/CHINA, with P-SIDS and others, supported the "utilization" of MGRs of ABNJ for the benefit of humankind as a whole, taking into consideration the interests and needs of developing states. Requesting deletion of the provision, the US and ICELAND objected to the implication that MGRs are the common heritage of humankind. ERITREA suggested that adopting an ecosystem approach would support the application of the common heritage of humankind to MGRs as it applies to mineral resources in the Area.

The G-77/CHINA supported retaining the provision that activities are carried out exclusively for peaceful purposes. The HOLY SEE suggested adding that states parties or their nationals shall not conduct MSR of MGRs "to the detriment of the human race for unethical or unapproved purposes as recognized by national or international law." Considering this a cross-cutting issue, AUSTRALIA, with SWITZERLAND, the US, and ICELAND, preferred addressing it in the preamble.

General Provisions: ***Use of Terms***: Views diverged on a definition of **access** in relation to MGRs, as the collection of MGRs, with bracketed references to MGRs accessed *in situ*, *ex situ*, and i*n silico*, and as digital sequence data and information. The G-77/CHINA, CARICOM, the LIKE-MINDED LATIN AMERICAN COUNTRIES, P-SIDS, and others stressed the need for a broader definition, going beyond the simple collection of MGRs. CARICOM suggested including "the collection, taking, obtaining, or exploitation of MGRs for their utilization." The LIKE-MINDED LATIN AMERICAN COUNTRIES suggested "access means, in relation to MGRs, access *in situ*, *ex situ*, *in silico*, and digital sequence data and information." The AFRICAN GROUP, P-SIDS, CARICOM, and others supported referencing the different types of access. The EU and NORWAY proposed that access in relation to MGRs means the collection of MGRs in ABNJ.

The RUSSIAN FEDERATION, NEW ZEALAND, AUSTRALIA, and the US did not support including a definition on access. The EU, NORWAY, the RUSSIAN FEDERATION, JAPAN, the REPUBLIC OF KOREA, and SWITZERLAND stressed that definitions can be better addressed after agreeing on the substantive provisions of the ILBI.

The AFRICAN GROUP, with the EU and NORWAY, proposed the definition of **marine genetic material** as "any material of marine plant, animal, microbial or other origin containing functional units of heredity." The US and JAPAN added that marine genetic material "does not include material made from material, such as derivatives, or information describing material, such as genetic sequence data," and, with INDONESIA, defined the scope as material "collected from ABNJ." P-SIDS suggested that the definition refer to any DNA or RNA in and from ABNJ. SWITZERLAND, with AUSTRALIA, urged aligning with CBD definitions. ERITREA requested clarity on the meaning of "actual or potential value" of marine genetic material, pointing to the work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on values.

On the definition of **MGRs**, views differed over the need for a separate definition of MGRs, as preferred by the G-77/CHINA, the AFRICAN GROUP, the LIKE-MINDED LATIN AMERICAN COUNTRIES, CARICOM, and P-SIDS, or defining it in conjunction with marine genetic material, as supported by the EU and the US. The AFRICAN GROUP called for also referring to derivatives and the data thereof.

The LIKE-MINDED LATIN AMERICAN COUNTRIES and CARICOM proposed that MGRs mean "any material of marine plant, animal, microbial, or other origin, containing functional units of heredity with actual or potential value of their genetic and biochemical properties." P-SIDS proposed that MGRs mean "any material of marine plant, animal, microbial or other origin, found in or originating from ABNJ and containing genetic information, including information or data relevant to biochemical properties and derivatives." CHINA requested deleting the reference to genetic and biochemical properties.

Informal Working Group on Cross-Cutting Issues

Relationship with UNCLOS, and other instruments and bodies: The G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, TURKEY, INDONESIA, and IRAN supported a provision noting that the ILBI's provisions "are not intended to affect the legal status of non-parties to UNCLOS or any other related agreements with regard to those instruments." TURKEY stressed it is the single most important provision for non-parties to UNCLOS. The US supported the idea included in the provision.

The EU, the REPUBLIC OF KOREA, AUSTRALIA, NORWAY, NEW ZEALAND, ICELAND, HOLY SEE, the RUSSIAN FEDERATION, CANADA, and ICEL requested its deletion. The EU underlined that, while the ILBI aims for universal participation, this provision risks "diverging interpretations that would challenge the integrity of the ILBI and UNCLOS." CANADA suggested that a preambular provision recognize that the ILBI does not affect the legal status of non-parties to UNCLOS.

On a provision noting that nothing in the ILBI shall prejudice the rights, jurisdiction, and duties of states under UNCLOS, the INTERNATIONAL SEABED AUTHORITY suggested also

including a reference to the 1994 Implementing Agreement. SOUTH AFRICA noted that it may problematic to subject the ILBI to another implementing agreement.

General principles and approaches: ***Title***: The G-77/CHINA supported referring to general "principles"; the US, AUSTRALIA, and the RUSSIAN FEDERATION, preferred "approaches"; and NORWAY, CANADA, and CARICOM noted that both principles and approaches seem appropriate.

The G-77/CHINA, with the AFRICAN GROUP, CARICOM, the EU, and others, supported including a provision that states parties shall apply an integrated approach. The US did not support including an integrated approach, querying, with the RUSSIAN FEDERATION, AUSTRALIA, JAPAN, and others, its meaning. To clarify, IUCN drew attention to CBD Article 10 (sustainable use).

The G-77/CHINA, with the AFRICAN GROUP, CARICOM, the EU, SWITZERLAND, CANADA, INDONESIA, and SRI LANKA, supported an approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity. The US, AUSTRALIA, and the REPUBLIC OF KOREA supported the reference to ecosystem resilience, but requested deletion of "climate change and ocean acidification."

The G-77/CHINA, with the AFRICAN GROUP, CARICOM, the EU, CANADA, INDONESIA, and SWITZERLAND, supported a provision requiring states parties to act so as not to transfer, directly or indirectly, damage or hazards from one area to another or to transform one type of pollution into another. The US and AUSTRALIA considered the provision superfluous, while JAPAN queried its implications. The HIGH SEAS ALLIANCE, supported by CARICOM, suggested taking "all appropriate and effective measures to prevent, reduce, and control transboundary impacts of BBNJ, including pollution from proposed or existing activities."

Regarding a provision to the effect that states parties shall "endeavor to promote" the internalization of environmental costs, taking into account the approach that the polluter should bear the cost of pollution, the G-77/CHINA, the EU, the RUSSIAN FEDERATION, and others expressed support. The US, opposed by the LIKE-MINDED LATIN AMERICAN COUNTRIES, INDONESIA, and SRI LANKA, requested that the polluter "should in principle" bear the cost. JAPAN requested a reference to the Rio Declaration (principle 16).

The AFRICAN GROUP, INDONESIA, and SRI LANKA supported a reference to the principle of non-regression, the G-77/CHINA requested clarification, and the US, with AUSTRALIA, SWITZERLAND, the RUSSIAN FEDERATION, and the REPUBLIC OF KOREA, called for deletion. No support was expressed for including "ensure accountability" or "take into consideration flexibility, pertinence, and effectiveness."

CHINA noted that some of the suggested principles are either not well recognized or only applicable to a specific number of provisions. The ALLIANCE OF SMALL ISLAND STATES (AOSIS) requested an additional provision taking into account the special circumstances of SIDS.

Additional principles and approaches: Delegates suggested additional principles to be considered for inclusion in the ILBI, *inter alia*: the common heritage of humankind; the polluter pays principle; the precautionary approach/principle; the principle of equity; the ecosystem approach; the use of best available science and traditional knowledge; transparency; ocean stewardship; adjacency; equitable benefit sharing; the obligation to protect and preserve the marine environment; and intra- and intergenerational equity. The RUSSIAN FEDERATION and CHINA reiterated that not all principles and approaches apply to each part of the agreement, with CHINA suggesting they be added to specific parts of the ILBI.

International Cooperation: On a provision that states parties shall cooperate for the conservation and sustainable use of BBNJ, including through strengthening and enhancing cooperation among existing relevant legal instruments and frameworks, and relevant global, regional, and sectoral bodies in the achievement of the objective of the ILBI, the G-77/CHINA, supported by CARICOM and many others, requested deleting the term "existing" and referring instead to "relevant legal instruments and frameworks," and, supported by the RUSSIAN FEDERATION, including "sub-regional" bodies.

Underlining that the ILBI cannot impose cooperation on other instruments, CANADA suggested "promoting" cooperation, and, supported by AUSTRALIA, referring to cooperation "with and among" relevant bodies. The US called for promoting cooperation "with" relevant bodies "as appropriate," and requested deleting the reference to "the achievement of the objective of this agreement."

JAPAN, NORWAY, the REPUBLIC OF KOREA, and ICELAND expressed satisfaction with the provision.

Noting the provision should apply to states parties "under this agreement," the EU, supported by SINGAPORE, the AFRICAN GROUP, and the HIGH SEAS ALLIANCE, proposed adding that states parties "shall endeavor to promote the objectives of this agreement when participating in decision making under other instruments, frameworks, or bodies."

The IUCN highlighted provisions on the objectives of international cooperation in the CBD and UNCLOS, and proposed, with FAO, a provision to the effect that states parties shall cooperate on a global, regional, and sub-regional basis "directly or through competent international organizations, in formulating and elaborating rules, standards, and recommended practices and procedures consistent with the Convention." Noting cooperation with the private sector is key, the ICPC called for also referring to "sectoral stakeholders."

On a provision on international cooperation in MSR, the G-77/CHINA, with the LIKE-MINDED LATIN AMERICAN COUNTRIES, opposed by CARICOM and the REPUBLIC OF KOREA, proposed deleting references to specific UNCLOS articles. The RUSSIAN FEDERATION did not support the provision. The EU, NORWAY, and CANADA reserved their position.

The US opined that, if at all retained, the provision should refer to cooperation "in consistence with" the UNCLOS articles, with IRAN, and "in support of" the ILBI. AUSTRALIA questioned the selection

of UNCLOS articles and noted that, if retained, the provision better be placed under Part V (capacity building and the transfer of marine technology).

The G-77/CHINA, the LIKE-MINDED LATIN AMERICAN COUNTRIES, the AFRICAN GROUP, JAPAN, SINGAPORE, the US, IRAN, ARGENTINA, and the HIGH SEAS ALLIANCE requested deleting the provision that states parties shall cooperate to establish new global, regional, and sectoral bodies, where necessary, to fill governance gaps. The AFRICAN GROUP, supported by ARGENTINA, noted that states parties are free to create the bodies that they deem necessary, but may not have the finances to do this. NEW ZEALAND, supported by AUSTRALIA, suggested states parties "may" pursue cooperation to this end. CARICOM did not support new bodies of any sort. The EU, NORWAY, NEW ZEALAND, CANADA, and AUSTRALIA supported the provision. The EU, AUSTRALIA, NAURU, and ICELAND requested deleting the reference to "governance gaps."

CANADA noted the value of establishing such bodies, notably in the context of ABMTs, with ARGENTINA, and supported cross-referencing specific elements of the ILBI and a reference to the objective of the ILBI.

The RUSSIAN FEDERATION preferred referring to existing organizations only, and where such do not exist, with ICELAND, envisaged states parties establishing "regional and sectoral" bodies.

Noting the need to ensure the effective implementation of the precautionary approach and the need to future proof the ILBI, NEW ZEALAND, supported by IUCN and the HIGH SEAS ALLIANCE, proposed an additional provision, to be placed in this article or in Article 48 (Conference of the Parties), that emergency or interim measures be taken if need arises, such as when a natural or human caused phenomenon has, or is likely going to have, an adverse impact on BBNJ, noting these measures should be based on best available science and be temporary.

The HIGH SEAS ALLIANCE emphasized that international cooperation should be pursued with regard to creating a network of MPAs in ABNJ, in undertaking EIAs, and to enable CB&TT.

Implementation and compliance: NORWAY, opposed by CARICOM and INDONESIA, preferred the article only address implementation, not compliance. AUSTRALIA saw merit in addressing implementation and compliance in distinct articles.

On a provision that states parties shall take the necessary legislative, administrative, or policy measures to ensure the implementation of the ILBI, a number of delegations noted linkages to implementation provisions under different parts, calling for streamlining and cross-referencing. The US questioned the need for the article, pointing to the Vienna Convention on the Law of Treaties. CANADA noted the value of a central provision on implementation, which would allow reducing repetition across the agreement. INDONESIA proposed referring to "effective" implementation.

On a provision that each state party shall monitor the implementation of its obligations under the ILBI, the LIKE-MINDED LATIN AMERICAN COUNTRIES proposed that each state party shall report to the COP on measures that it has taken to implement the ILBI. SWITZERLAND referenced agreed language under the Minamata Convention on Mercury. CARICOM, the US, and AUSTRALIA cautioned against burdensome reporting requirements, with the MALDIVES and NEW ZEALAND specifically pointing to SIDS. CHINA opposed a review by the COP and preferred information reports to be submitted to the clearing-house mechanism. NEW ZEALAND suggested reports be submitted at "regular" intervals and be made publicly available, and proposed that the COP invite global, regional, and sectoral bodies to report on their implementation. AUSTRALIA requested clarification on the information to be covered in the reports.

On a provision that the COP shall consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of the ILBI and to address cases of non-compliance, CHINA requested deleting the reference to the COP "addressing cases of non-compliance." The US opposed a compliance mechanism altogether. AUSTRALIA and CANADA expressed support for a compliance mechanism, calling for addressing non-compliance in a constructive way. The HIGH SEAS ALLIANCE pointed to the compliance committees of the Aarhus Convention and the Espoo Convention as examples for facilitative and assistance-oriented compliance mechanisms.

The EU, with the US and JAPAN, said questions related to implementation should be addressed once delegations have a better understanding of obligations under the ILBI.

In the Corridors

On Wednesday morning, delegates focused on the very definition of "what it is we are talking about here." Pointing to the lengthy exchange on the definition of "access" in relation to marine genetic resources, and on the definition of MGRs themselves, an observer lamented, "it seems like we are stuck in a loop: when we are looking at the substance, decisions are deferred for lack of a definition, and then once we get to the definitions, we are told to wait until we decide on substance." Entering the informal working group on cross-cutting issues, including the previously testy matter of principles and approaches, one delegate expressed hope that the discussions might "bring some clarity" on the issues underpinning the future High Seas instrument, adding that, at the moment, "these discussions are scattered all over the text. We need to chart a coherent way forward."

Others were more cynical, sharing that "we are being held up by those who did not see the merit of having a global instrument to begin with." A key case in point, one delegate noted, relates to how individual delegations are referring to existing provisions and definitions. He elaborated that "back in the 1970s we thought the deep ocean was little more than an underwater desert, but now we know better, so we should do better."