

BBNJ IGC-1 Highlights: Thursday, 13 September 2018

At the Intergovernmental Conference (IGC) on an international legally binding instrument (ILBI) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (ABNJ), the informal working group on marine genetic resources (MGRs) discussed:

- access and benefit-sharing (ABS);
- monitoring; and
- definitions and principles.

The informal working group on area-based management tools (ABMTs), including marine protected areas (MPAs), completed its work, and was followed by a short plenary.

Informal Working Group on MGRs

The G-77/CHINA clarified that common heritage should govern MGR exploitation while high seas freedoms should address access to MGRs under appropriate regulations. Responding to a statement that the UN Convention on the Law of the Sea (UNCLOS) negotiators decided to exclude sedentary species from the definition of resources in the Area, the AFRICAN GROUP recalled the limited knowledge of biodiversity of ABNJ and lack of awareness of their economic value during UNCLOS negotiations, calling for a single, light access regime for ABNJ governed by the ILBI conference of the parties (COP); and argued that UNCLOS provisions on non-recognition of marine scientific research (MSR) activities as the legal basis for claims and on publication and dissemination of information and knowledge apply to MGRs, derivatives, and bioprospecting. JAPAN referred to scientific findings in the 1800s and 1960s, as well as 1979 and 1982 patents related to marine living organisms, such as the sea pineapple for medical purposes.

Access: ECUADOR highlighted that open access does not entail lack of regulation or management such as: identification of genomics; taxonomic research possibilities; identification of actors, experiences, and expertise; identification of projects; alignment with sustainability; traceability; and identification of common inventories. He also indicated that notifications could be done electronically, following regional or global database systems' protocols addressing metadata. The INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW emphasized the need for non-burdensome systems for access and notification, calling for a clear relationship with the Antarctic Treaty System on overlaps with ABNJ.

Benefit-sharing: The G-77/CHINA recommended: a binding obligation to cooperate, including on benefit-sharing and on the establishment of an ABS mechanism; a protocol, guidelines or a code of conduct to ensure environmental protection, compliance, transparency, cooperation, and data sharing; and both monetary and non-monetary benefit-sharing, through a trust fund and drawing from the Nagoya Protocol. JAMAICA underscored that availability

of non-monetary benefits should not preclude providing monetary benefits to ensure a future-proof ILBI, calling for payments for royalties or milestone payments. CHINA suggested that the ILBI: require parties to report on information regarding MGR access to the COP for its review and recommendation; mandate the COP to manage MGRs and benefit-sharing; and potentially provide for a voluntary trust fund.

IPRs: The World Intellectual Property Organization pointed to bracketed text on MGRs of ABNJ being negotiated under its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

Monitoring of MGR Utilization: AOSIS suggested that a scientific committee or clearinghouse monitor MGR utilization. CARICOM supported disclosure of origin of MGRs. P-SIDS supported a non-exclusive license to access MGRs, allocation of MGR identifiers, and a notification requirement upon access. The AFRICAN GROUP emphasized an obligatory, open prior electronic notification system as a platform managed under the ILBI, setting conditions for access to sample and data, and for practical arrangements to monitor MGR utilization. CHILE supported registration requirements, a protocol and guidelines, and a repository to improve monitoring.

The EU and the US opposed monitoring MGR utilization. JAPAN stated that a traceability mechanism is a disincentive to MSR, and referred to the International Convention for the Safety of Life at Sea (SOLAS), which requires identification systems transmitting vessels' location to a public International Maritime Organization (IMO) website.

The HOLY SEE identified as challenges to disclosure that research findings are viewed as a marketable commodity, calling for basic disclosure requirements and regulation of access to ensure public scrutiny of MGRs and prevent corporations' undue influence over ocean biodiversity.

Definitions: The G-77/CHINA noted that MGRs, utilization of MGRs, and related technical terms should be defined. AOSIS proposed defining *in situ*, *ex situ*, derivatives and, with CHINA, access. P-SIDS proposed defining MGR source or origin. The AFRICAN GROUP underscored the need to define derivatives, supported by CARICOM, and biotechnology, supported by P-SIDS; and suggested as definition for MGRs in ABNJ "any material of marine, plant, animal, microbial or other origin found in or originating from ABNJ and containing functional units of heredity, as well as any material, derivatives and/or data thereof with actual or potential value for their genetic or biochemical properties." The HOLY SEE queried if this definition would include viruses. The EU recommended drawing on definitions in existing instruments.

Principles: AOSIS proposed freedoms of high seas, common heritage, right to conduct MSR, equitable sharing of benefits, duty to protect the marine environment, and SIDS' special case. P-SIDS proposed non-appropriation, adjacency, and compatibility. The EU preferred not to elaborate additional principles.

Relationships with Other Bodies: The G-77/CHINA suggested not undermining, and using the expertise of, relevant instruments and bodies, including the International Seabed Authority (ISA), Convention on Biological Diversity (CBD), and Food and Agriculture Organization (FAO). The AFRICAN GROUP proposed drawing from the Nagoya Protocol and UNCLOS Part XI Implementing Agreement provisions on relationships.

Informal Working Group on ABMTs

Approach: The IUCN suggested: distinguishing ABMT types; enhancing sectoral and regional organizations' role and effectiveness to adopt ABMTs, referring to the Fish Stocks Agreement and the CBD; and adopting a global approach for MPAs based on states' duty to protect the marine environment and their power to adopt directly and collectively more stringent measures than sectoral ones.

WWF advocated: using marine spatial planning to support integrated ocean and ecosystem-based management; designating MPAs based on their biodiversity values, and not on threats; and ensuring management by the competent body. ISRAEL highlighted common heritage, noting that objectives should be based on designation of large and representative areas, be monitored and support a long-term strategy of a global MPA network.

Process: The IUCN called for a global decision-making body empowered to identify, consult on, and adopt protective measures for MPAs, implemented through parties' regulation of activities within their jurisdiction and control. Cautioning against creating "paper parks," the HIGH SEAS ALLIANCE called on the ILBI COP to designate MPAs and implement marine protection measures. The AFRICAN GROUP said that if an MPA was to fall entirely or partially within a maritime zone under the sovereignty or jurisdiction of a state, after its establishment, that MPA would cease to be in force or be amended accordingly. The EU recommended stating that nothing should prevent parties from adopting additional or stricter measures and encouraging non-party states to adopt similar measures to those in an ABMT management plan.

IUCN called for a process aimed at consensus but not requiring it, pointing to the South Pacific Regional Fisheries Management Organization (SPRFMO) model. PAPUA NEW GUINEA called for interim measures, given the potential lengthy MPA establishment process, supported by the HIGH SEAS ALLIANCE. P-SIDS favored a global decision-making body and regional committees for ABMT implementation and stakeholder consultation. The INTERNATIONAL CABLE PROTECTION COMMITTEE recommended including industry representatives in developing ABMTs. The HOLY SEE called for: economic tools, such as entry fees, licensing fees, insurance tied to asset depletion, and penalties for non-compliance, including fines; and a clause preventing the financing, sale or supply of technology, or other commercial transactions that pose a significant risk of contributing to prohibited activities harmful to the environment.

Monitoring: The G-77/CHINA proposed communication, reporting, and a compliance system based on best available science and overseen by a scientific/technical body, with the COP deciding on follow up.

The EU: queried who would assess MPA effectiveness and progress in achieving conservation objectives; cautioned against time-bound measures for MPAs; and proposed that parties report regularly on implementation, with the scientific/technical body assessing reports and making recommendations under follow-up procedures to be established.

The PHILIPPINES underscored that ABMT management plans should guide implementation, as well as the degree of protection and evaluation measures, and supported adaptive management, a compliance mechanism, an incentive system, and a global oversight body. P-SIDS favored: the identification of areas of improvement or adjustment; adaptive management using best scientific information; provisions on non-compliance and a compliance committee; collaboration with existing instruments and standardized reporting; and a coordinating entity under the ILBI.

MEXICO highlighted flag state responsibility; suggested exploring whether international organizations and port states could enforce ABMTs; and supported a science-based, regular review of ABMTs' effectiveness for potential adjustments, similar to the designation mechanism, including stakeholder consultation. The HOLY SEE supported monitoring MGR collection into common pools and follow-up research studies through a clearinghouse to enable capital markets to fund research and development on MGRs.

CHILE called for a periodic review mechanism using publicly available reports to monitor, oversee, and improve enforcement of conservation goals. NIGERIA proposed delegating scientific monitoring to appropriate regional bodies when they meet ILBI standards. CHINA stressed the need for clear provisions on monitoring and review by the ILBI scientific and technical committee. COSTA RICA called for regular monitoring and evaluation of MPAs to identify loopholes and recommend amendments. CANADA suggested a two-tier monitoring process, one at the ABMT level and the other addressing the whole mechanism.

The HIGH SEAS ALLIANCE suggested emergency measures, drawing from the Kuala Lumpur Supplementary Protocol on Liability and Redress and the SPRFMO Convention. IUCN suggested developing sectoral and cross-sectoral, regional biodiversity strategies and action plans, building on CBD Article 6 (general measures) and Fish Stocks Agreement Article 5 (principles).

Definitions: The EU highlighted the absence of a universal definition of ABMTs. CHINA suggested defining ABMTs and MPAs. The HIGH SEAS ALLIANCE recommended drawing from CBD Article 2 (definitions) to define MPAs.

Principles: The EU suggested drawing on the UN Fish Stocks Agreement. NIGERIA highlighted good environmental governance, transparency, full access to information, full public participation, and access to review procedures. CHINA emphasized: coastal states' rights and obligations; equal importance of conservation and sustainable use; integrated management; best available scientific evidence; differentiated level of protection; international cooperation and coordination; mutual consideration; and necessity and proportionality. COSTA RICA added restoration and maintenance of ecosystems in ABNTJ, and custodianship of the marine environment for present and future generations.

Relationships: NORWAY suggested stating the functions that the ILBI bodies will not perform, in relation to activities already sufficiently managed by other bodies. COSTA RICA recommended extending the duty to cooperate to international organizations.

Clearinghouse: NIGERIA supported establishing a clearinghouse for each issue under discussion, noting it will function, at a minimum, as data repository and information dissemination mechanism. CHINA called for a transparent, open platform for information sharing. The HIGH SEAS ALLIANCE noted the importance of data and information relevant to ecological characteristics to underpin a science-based approach to ABMTs.

Plenary

IGC President Lee proposed as the dates for IGC-2, 25 March-5 April 2019 and for IGC-3, 19-30 August 2019, subject to the UN General Assembly's confirmation. Supporting the proposed dates, the G-77/CHINA and the EU noted the need for adequate preparation time. The EU also requested a zero draft before the end of the year.

In the Corridors

After completing substantive discussions on the package, the corridors were abuzz with expectations regarding next steps, including a possible zero draft. One delegate exclaimed that "we are not quite ready to start treaty negotiations," considering it more prudent to proceed with a non-paper laying out the options that cement – and in few cases clarify – the legacy of the PrepCom. Another participant offered: "as long as the new paper starts using treaty language, IGC-2 can push the process forward," adding that "many confide in the President's ability to come up with a balanced text."