

PREPCOM 3 HIGHLIGHTS: MONDAY, 27 MARCH 2017

On Monday, 27 March, PrepCom 3 plenary convened briefly in the morning, followed by the informal working group on marine genetic resources (MGRs), which met for the rest of the day.

OPENING PLENARY

Opening the session, PrepCom Chair Carlos Sobral Duarte (Brazil) paid tribute, seconded by many, to former PrepCom Chair Eden Charles, and recommended building on the work done at prior sessions. Stephen Mathias, Assistant Secretary-General, Office of Legal Affairs, expressed appreciation for the contributions to the Voluntary Trust Fund from Finland, Ireland, the Netherlands and New Zealand.

ORGANIZATIONAL MATTERS: Delegates approved the provisional agenda (AC.287/2017/PC.3/L.1) and the programme of work (AC.287/2017/PC.3/L.2) without amendment. Chair Duarte announced as the facilitators of the informal working groups: René Lefeber (the Netherlands) on EIAs; Rena Lee (Singapore) on capacity building and technology transfer; Janine Coye-Felson (Belize) on MGRs; Alice Revell (New Zealand) on ABMTs; and Chair Duarte on cross-cutting issues. Chair Duarte drew attention to the Chair's non-paper on elements of a draft text of an ILBI, based on submissions made up to December 2016, and a supplement with submissions made after that date.

INFORMAL WORKING GROUP ON MGRS

DEFINITIONS: Ecuador, for the Group of 77 and China (G-77/CHINA), called for defining ABS and compliance. Algeria, for the AFRICAN GROUP, considered a definition of MGRs necessary, noting that definitions should be consistent with UNCLOS, the UN Fish Stocks Agreement (UNFSA) and the CBD. The PHILIPPINES, COLOMBIA and MEXICO noted that definitions should cover *in situ*, *ex situ* and *in silico* MGRs, as well as derivatives.

Fisheries: Barbados for the CARRIBEAN COMMUNITY (CARICOM) called for the definition of MGRs to include fish used for their genetic properties. Several delegations recommended distinguishing between fish used for research and development purposes and fish used as a commodity, with FIJI calling for also including geographical considerations. The European Union (EU) stressed that fish as biological resources are outside the mandate of the ILBI. JAPAN, opposed by INDONESIA, favored excluding fish used as commodities. ARGENTINA, supported by MEXICO, called for including mollusks in the definition of MGRs. BRAZIL underscored the need for flexibility for using genetic components of MGRs for improving food security.

Derivatives and data: The AFRICAN GROUP asserted that there was no scientific basis for excluding derivatives from the ILBI scope. JAPAN and the REPUBLIC OF KOREA said there was no need to define derivatives. Nauru, for the PACIFIC SMALL ISLAND DEVELOPING STATES (PSIDS), underscored that derivatives need to be traceable. BRAZIL, opposed by the REPUBLIC OF KOREA, recommended addressing digital sequence information.

PRINCIPLES AND APPROACHES: The G-77/CHINA observed that the principle of common heritage of humankind must underpin the new regime given its crosscutting nature and its benefit-sharing obligations, with CARICOM noting that the common concern for humankind principle does not "go far enough." IRAN also pointed to the CBD principles of prior informed consent, and fair and equitable benefit-sharing.

The EU called for setting aside discussions of the legal status of MGRs of ABNJ, calling, with AUSTRALIA and NEW ZEALAND, for a practical focus. SOUTH AFRICA suggested that high seas freedoms apply to high seas MGRs, including benefit-sharing, while common heritage governs MGRs of the Area. ARGENTINA reiterated that MGRs in the Area fall under the common heritage regime. PSIDS underlined that MGRs of ABNJ are part of common heritage.

BANGLADESH drew attention to UNCLOS Articles 312 (Amendment) and 314 (Amendments relating exclusively to activities in the Area) to allow consideration of MGRs under the common heritage regime. NEPAL and others emphasized that freedom of the high seas and common heritage are not mutually exclusive. The FEDERATED STATES OF MICRONESIA (FSM) emphasized the common heritage principle, noting that MGRs of ABNJ should not be reserved to those with the capacity to explore and exploit them, and that future generations should also be considered. In addition to the common heritage principle, MEXICO highlighted the sustainable use of resources, equitable benefit-sharing, transparency in access to information and no claims for sovereignty in ABNJ. CHILE highlighted the need to discuss practical aspects, focusing on modalities for implementation.

Cautioning against prejudicing existing agreements, the RUSSIAN FEDERATION opined that MGRs do not include fish and marine mammals. The US, the RUSSIAN FEDERATION and JAPAN observed that mineral resources in the Area are part of common heritage but it would not be appropriate to apply this principle to MGRs of ABNJ. INDONESIA supported a *sui generis* regime. ICELAND stated that common heritage and high seas freedoms are mutually exclusive. COSTA RICA argued that they are complementary. NIGERIA called for flexibility to accommodate future scientific progress.

IUCN emphasized: the principle of common concern of humankind, the need for a clear set of rules and legal certainty for ABS and scientific research, and the opportunity to make access to MGRs of ABNJ for scientific research contingent on making data available.

ACCESS: The G-77/CHINA supported developing a code of conduct. CARICOM, PSIDS and the AFRICAN GROUP recommended including MGRs *ex situ* and *in silico* in the ABS regime, with CARICOM noting the need for requiring notifications to ensure traceability and monitoring, without hindering MSR, and with ARGENTINA noting that this could be done by issuing “passports” for MGRs in ABNJ or relying on the Nagoya Protocol’s internationally recognized certificate of compliance. JAMAICA and PSIDS noted that this would support the flow of information and strengthen marine technology transfer.

The EU said that access to MGRs for MSR should not be restricted. ALGERIA underscored the distinction between MSR and bioprospecting. Maldives, for the ALLIANCE OF SMALL ISLAND STATES (AOSIS), noted that regulating access to MGRs may be of value. JAPAN expressed concern that the ILBI might restrict access to MGRs of ABNJ.

SINGAPORE preferred less regulation of access and expressed interest in exploring a notification obligation. PERU noted that access should not be left unregulated, stressing the need to distinguish between “access to” and “ownership of” MGRs, as well as between MSR and bioprospecting. AUSTRALIA, with NEW ZEALAND, highlighted that the ILBI should not stifle access for research and innovation. JAPAN recalled numerous unsuccessful attempts to define MSR, cautioning against unnecessary restrictions.

BENEFIT-SHARING: The G-77/CHINA called for both monetary and non-monetary benefit-sharing, with: AOSIS requesting capacity building specifically targeted to SIDS and special consideration for SIDS in creating a benefit-sharing fund; PSIDS suggesting that mandatory monetary benefit-sharing could contribute to a trust fund to facilitate capacity building in developing countries; and PERU drawing attention to the mechanisms under FAO and WHO. MEXICO said that the Nagoya Protocol, the CBD, the ISA and the ITPGRFA could provide inspiration.

The AFRICAN GROUP said benefit-sharing should be inspired by Nagoya Protocol Article 10 (global multilateral benefit-sharing mechanism). He called for: a benefit-sharing mechanism administered by the secretariat of the IBLI, and benefit-sharing to support the designation and management of MPAs and for capacity building and technology transfer related to ABNJ. Stressing the need for a benefit-sharing system, CARICOM and BRAZIL proposed that monetary benefits could arise upon commercialization. BANGLADESH suggested extending and modifying UNCLOS Article 82 (payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles).

The RUSSIAN FEDERATION, the US, CANADA and JAPAN called for focusing on non-monetary benefit-sharing. JAMAICA highlighted that common heritage is not intended to stifle innovation or focus exclusively on non-monetary benefits, and underlined that the ILBI should reflect the potential for benefits accruing from MSR. The US, JAPAN and NORWAY cautioned that monetary benefit-sharing could be a disincentive to MSR. ICELAND noted that non-monetary benefit-sharing could encourage investment in MSR. NORWAY and NEW ZEALAND noted that non-monetary benefits also have financial value.

SINGAPORE highlighted that the timelines for monetary and non-monetary benefits vary, and pointed to the Clearinghouse under the Nagoya Protocol that could address non-monetary benefits and facilitate knowledge-sharing. AUSTRALIA proposed that a functional, cost-effective benefit-sharing regime that encourages research, underscoring the importance of non-monetary benefits. The REPUBLIC OF KOREA said the regime should be conducive to the conservation and sustainable use of MGRs. NEW ZEALAND suggested considering benefits at different stages, namely collection, analysis and utilization of MGRs, and cautioned against disincentivizing MSR.

INTELLECTUAL PROPERTY RIGHTS (IPRs): Arguing that the ILBI should include IPRs, the AFRICAN GROUP supported: with CARICOM and NEPAL, developing a *sui generis* system; and with IRAN and BRAZIL, establishing mandatory disclosure of the origin of MGRs in patent applications.

JAPAN, CANADA, NORWAY, CHILE, SINGAPORE and the US cautioned against IPR-related provisions in the ILBI, because IPRs are addressed under other fora. Recognizing the key role of the World Intellectual Property Organization (WIPO), MEXICO stressed that inventions, processes and products can be subject to IPRs, but MGRs *per se* cannot; and drew attention to potential changes of use. HONDURAS called for addressing IPRs in the ILBI.

TRADITIONAL KNOWLEDGE: CARICOM and IRAN supported respect for traditional knowledge in the conservation and sustainable use of BBNJ. ARGENTINA highlighted the need to clarify the implications of including traditional knowledge under the ILBI. PSIDS noted that the use of traditional knowledge requires free prior informed consent, highlighting the opportunity to guarantee certain levels of benefits for traditional knowledge holders.

CLEARINGHOUSE MECHANISM (CHM): The G-77/CHINA called for establishing a clearinghouse mechanism (CHM), with AOSIS recommending an accessible and easy CHM including a network or platforms for knowledge sharing. CANADA supported a CHM for information sharing and for matching needs and available expertise. BRAZIL favored a CHM for sharing data and information, pointing to the Nagoya Protocol.

IN THE CORRIDORS

PrepCom 3 opened to a packed plenary, thanks to increased contributions to the Voluntary Trust Fund. Many delegates appeared enthused by the Chair’s non-paper, lauding it as a helpful tool providing a detailed structure for the next stage of negotiations and possibly for the ILBI itself. As discussions moved quickly into an informal setting to continue deliberations on marine genetic resources, the well-known debate on common heritage of humankind versus high seas freedoms was rehashed. In an effort to shift attention to modalities for implementation, some put forward as a pragmatic compromise to focus only on non-monetary benefit-sharing – an area of convergence identified at PrepCom 2. Others preferred to keep options open, addressing both monetary and non-monetary benefits, similar to the Nagoya Protocol. A few, however, flagged that this divergence of views is a false dichotomy, noting that non-monetary benefits also have a price tag. As PrepCom 3 is widely expected to provide the final substantive exchange before the drafting of recommendations to the General Assembly, several participants left for the evening wondering how this phase of the negotiations will overcome seemingly intractable binary issues and move towards developing concrete elements for an ILBI.