

## PREPCOM 3 HIGHLIGHTS: TUESDAY, 4 APRIL 2017

On Tuesday, 4 April, plenary reconvened in the morning and in the afternoon, with the informal working group on cross-cutting issues completing its work in the morning.

### PLENARY

Stressing the importance of the BBNJ process in oceans stewardship, Amb. Peter Thomson (Fiji), UN General Assembly President, encouraged delegates to bring cooperation, flexibility and determination to the BBNJ process and to participate in the upcoming Oceans Conference.

**MARINE GENETIC RESOURCES:** Following a report by Facilitator Coye-Felson on informal working group discussions, Chair Duarte proposed focusing on: principles and approaches other than common heritage and high seas freedoms; the applicable legal regime; a scientific threshold for considering resources as commodities; derivatives and genetic sequence data; the need to depart from the monetary/non-monetary benefit-sharing dichotomy; earn-out provisions; benefit-sharing modalities; and monitoring MGR use, compliance certification and institutional arrangements.

MEXICO, speaking on behalf of ARGENTINA, BRAZIL, CHILE, COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, GUATEMALA, HONDURAS, and URUGUAY, highlighted: common heritage as the guiding principle, supported by PSIDS; including fish as marine genetic resources (MGRs), supported by the EU; monetary and non-monetary benefit-sharing; capacity building and technology transfer (CB&TT) to facilitate access and utilization of MGRs; intellectual property rights (IPRs) considerations; and, with PSIDS and the AFRICAN GROUP, traceability of MGRs. CARICOM noted that there is no consensus on the principles guiding MGRs in ABNJ.

**Scope:** The FSM and the AFRICAN GROUP, opposed by CHINA and CANADA, noted that derivatives should be included in the definitions. COSTA RICA, supported by ARGENTINA, proposed relying on the Nagoya Protocol definition of genetic resources including derivatives, and also addressing digital data. CARICOM supported an ABS regime covering *in situ* and *ex situ* resources. JAPAN and SWITZERLAND suggested waiting for the conclusions of CBD discussions on genetic sequence data. BRAZIL favored a dialogue between the PrepCom and the CBD. The US opposed sharing benefits from *ex situ* MGRs or genetic sequence data, cautioning against importing CBD negotiations into the BBNJ process. ARGENTINA argued that the CBD Conference of Parties (COP) is looking into digital sequence data within national jurisdiction. On the distinction between fish as commodities and as genetic resources, CHINA stressed that UNCLOS and the UN Fish Stocks Agreement (UNFSA) have clear provisions on fisheries.

**Access:** The AFRICAN GROUP favored an ABS mechanism under the ILBI COP to receive obligatory prior notification of bioprospecting in a centralized database, and establish a code of conduct for bioprospectors. JAPAN welcomed the African Group's openness to consider notification, rather than prior informed consent. PSIDS stressed the link between access and CB&TT; proposed a benefit-sharing trust fund to promote access and utilization of MGRs by developing countries, particularly SIDS; and supported a mechanism facilitating CB&TT in MGR analysis and utilization. INDIA underscored the need to regulate MGR access and use to prevent over-exploitation and promote benefit-sharing. CHINA favored an open-access system of MGRs *in situ*, noting that states may provide, on a voluntary basis, notification through the clearinghouse mechanism (CHM) on the MGRs collected.

**Benefit-sharing:** MAURITIUS proposed priority for coastal states in benefit-sharing from MGRs in the water column above their extended continental shelf. JAPAN stressed that the private sector, rather than governments, would share benefits. COSTA RICA supported advance fixed-amount payments or license fees, in addition to royalties. The PHILIPPINES recommended linking monetary and non-monetary benefit-sharing to the different stages of exploration, evaluation, development and commercialization. The EU, SWITZERLAND and CHINA suggested focusing on non-monetary benefit-sharing. CANADA reiterated the need to put aside the dichotomy between monetary and non-monetary benefits and focus on the various means for benefit-sharing. IUCN suggested sharing benefits through open access to raw data, targeted training and sharing of best practices, information on species identification, and marine spatial planning in ABNJ.

The FSM envisaged benefit-sharing upon sample collection, a fee to ensure exclusive access, and additional monetary benefit-sharing upon commercialization. JAPAN cautioned against discussing benefit-sharing modalities based on assumptions. The AFRICAN GROUP favored: compulsory monetary benefit-sharing upon commercialization; a sector-specific approach related to the added value of the commercialized product; and the channeling of proceeds through a benefit-sharing fund to support CB&TT, and training in developing countries.

**IPRs:** The EU and SWITZERLAND recommended addressing IPRs in other fora, with CANADA also opposing requirements to disclose origin in patent applications. CHILE noted that WIPO focuses on IPRs in relation to genetic resources within national jurisdiction.

**CHM:** Supporting transparent traceability through a CHM, TONGA stressed that a dynamic knowledge base will strengthen developing states' scientific research capacities. The IOC emphasized information-sharing as an enabler of benefit-sharing, pointing to Ocean Biogeographic Information System's (OBIS) existing network of institutions, quality control and standardization.

**INFORMAL WORKING GROUP ON CROSS-CUTTING ISSUES**

**INSTITUTIONAL ARRANGEMENTS:** NORWAY preferred a hybrid approach of global and regional elements, supporting the WWF written submission, and expressing the need for: a COP where states and stakeholders exchange views, to provide direction to the regional level; a scientific function, potentially at the regional level; a secretariat role performed by a strengthened UNDOALOS; and a clearinghouse, which could be managed by UNDOALOS, drawing from the International Seabed Authority (ISA) or the Intergovernmental Oceanographic Commission (IOC). Agreeing on a hybrid approach, CHILE proposed focusing global regulations on existing gaps, based on cooperation, coordination, compatibility, transparency and accountability. TONGA observed that a hybrid approach captures the accumulated expertise of regional and sectoral organizations and the need for coherence and international regulation of areas that fall outside their mandates; and favored a CHM, an assembly as a governing body, a smaller executive body, and an elected technical and scientific body.

Warning about challenges to amending regional mechanisms' mandates to fulfill greater responsibilities, COSTA RICA reiterated the importance of a global mechanism setting standards for ABNJ and supervising compliance. JAPAN supported a COP providing policy guidance on MPAs and EIA guidelines; a scientific committee, to be discussed at a later stage; and UNDOALOS as secretariat. SAUDI ARABIA called for a secretariat, a decision-making body such as a COP, a scientific and technical advisory body, a mechanism to promote technical and scientific knowledge, an ABS mechanism and a tribunal.

Supporting UNDOALOS as the secretariat and sectoral organizations participating in a scientific forum, FIJI proposed an evolutionary, minimalistic approach to the ILBI's institutional arrangements. ARGENTINA stated that where there are no competent organizations, the ILBI should not encourage their establishment.

The PHILIPPINES suggested establishing: a scientific advisory committee, a regulatory committee, a CB&TT committee, a monitoring and compliance committee, a secretariat and a review conference. BANGLADESH pointed to the ISA, with an expanded mandate, as the most cost-effective institutional option to provide policy guidelines to existing organizations to bridge gaps, especially related to MGRs, ABMTs and EIAs.

Recalling the weak international institutional structure for conservation, the HOLY SEE stressed the political nature of establishing an MPA network in ABNJ requiring a global perspective, as well as the need for marine spatial planning and strategic environmental assessments; favored ILBI provisions stimulating measures at the regional level and ensuring their implementation; and suggested a scientific advisory body for each region, coordinating with existing ones, to provide a single information repository.

IUCN proposed that a scientific committee should coordinate scientific input and advice from global and regional structures, ensuring transparency and independence. The International Commission for the Conservation of Atlantic Tunas (ICCAT) highlighted RFMOs' role under the ILBI, including leveraging scientific management and conservation knowledge. WWF suggested that the ILBI COP establish regional integrated oceans management committees as subsidiary bodies, with delegated roles to coordinate action under regional and sectoral bodies with BBNJ-related mandates, as well as biodiversity-related conventions.

**REVIEW, MONITORING and COMPLIANCE:** JAPAN considered discussions on a compliance mechanism premature, suggesting use of existing compliance mechanisms under other bodies. PSIDS supported a global-level compliance committee, reporting to a decision-making authority and complemented by regional and sub-regional authorities.

FIJI supported periodic review, pointing to the ISA's practice. The AFRICAN GROUP proposed: a regular reporting and review process on conservation and management measures; publically available reports; and review of reports by a scientific body. CARICOM recommended taking into account regional bodies in any monitoring and compliance mechanism, and establishing a periodic review, with MEXICO proposing that the ILBI COP conduct regular reviews and INDONESIA calling for discussion on their scope and triggers. CANADA proposed the ILBI COP should conduct and guide reviews.

Favoring the UNFSA review conference model, NEW ZEALAND envisaged reviews of the: performance of the institutional body; decisions taken under the ILBI; performance of parties' implementation; and performance of regional and sectoral bodies.

**RESPONSIBILITY AND LIABILITY:** The AFRICAN GROUP pointed to UNCLOS Article 304 (responsibility and liability for damage) and, with NEW ZEALAND, UNFSA Article 35 (responsibility and liability). The EU and IRAN noted that there is no need for an explicit provision on responsibility. The US said that existing rules on responsibility and liability suffice.

Linking the issue to the need for dedicated funding for ILBI implementation, CARICOM called for voluntary and mandatory contributions. PSIDS, supported by IUCN and opposed by JAPAN, suggested establishing a rehabilitation fund and a liability fund under the ILBI. MEXICO, supported by COSTA RICA, prioritized preventive measures, with liability and responsibility provisions serving as a "plan B" to address violations, reparations and mitigation. TONGA, supported by IUCN, highlighted state parties' due diligence and cooperation in ILBI implementation and enforcement. IUCN asserted that all states should have standing to seek redress for damage.

**DISPUTE SETTLEMENT:** PSIDS supported an ILBI dispute-resolution mechanism. The AFRICAN GROUP pointed to UNCLOS provisions on peaceful dispute settlement as a starting point. Considering recourse to the International Tribunal for the Law of the Sea (ITLOS) as a last resort, CARICOM, supported by CANADA and INDONESIA, favored drawing on UNFSA provisions on peaceful dispute resolution. MEXICO called for non-adversarial dispute resolution to address technical disputes, with COLOMBIA suggesting they be resolved by a group of experts.

TONGA suggested granting non-parties and stakeholders' access to the dispute-settlement mechanisms, with GREENPEACE pointing to the inquiry commission under the Espoo Convention Implementation Committee and the Aarhus Convention Compliance Committee, and the possibility of establishing an ITLOS special chamber on marine biodiversity. IUCN supported: an efficient and timely dispute-resolution procedure; a facilitative compliance mechanisms; and reliance on ITLOS where necessary.

NEW ZEALAND, IRAN and PERU suggested providing for advisory opinions, with GREENPEACE noting that non-state actors do not have access to relevant ITLOS procedures. The EU favored a simple provision on peaceful dispute-settlement means, with the PHILIPPINES suggesting allowing for regional dispute settlement. The US favored arbitration.

**IN THE CORRIDORS**

Appearing reinvigorated by the UN General Assembly President's clarion call to make 2017 the turning point for oceans, PrepCom 3 delegates rolled up their sleeves to tackle areas needing further deliberation in relation to marine genetic resources, with many determined to make headway on this charged issue. Some, however, were not too happy with the format. "It may be time for some text on screen," one opined. "Gauging progress so far, and what work still remains, is of the essence," another asserted, surmising that it would probably be easier to find common ground around a limited and streamlined set of options than on the current plethora of possibilities, which have emerged so far.