

## BBNJ IGC-1 Highlights: Wednesday, 12 September 2018

At the first session of the Intergovernmental Conference (IGC) on an international legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (ABNJ), the informal working group on marine genetic resources (MGRs), continued to exchange views on:

- scope;
- access and benefit-sharing (ABS); and
- intellectual property rights (IPRs).

### Informal Working Group on MGRs

**Scope:** Expressing caution, with the US, about monetary benefit-sharing due to costly, difficult, and lengthy commercialization of MGRs, JAPAN called for a practical and realistic ILBI, and for deciding at a later stage on the scope in relation to MGRs. The US, with CANADA and ICELAND, opposed by the FSM and MEXICO, cautioned against including MGRs *ex situ*. CARICOM, the US, and SWITZERLAND supported applying the ILBI to MGR collection only after entry into force.

**Fish:** BANGLADESH, INDONESIA, SWITZERLAND, and ECUADOR favored including both fish used as a commodity and as a source of MGRs under the ILBI. The US, HONDURAS, and ICELAND opposed including the use of fish as commodity. The RUSSIAN FEDERATION called for fishing and marine scientific research (MSR) to be carried out freely, noting, with others, that fisheries are already regulated by the Fish Stocks Agreement. FIJI argued that genetic resources from fish used as commodity should be regulated under the MGR regime.

INDIA stressed that the value, rather than the volume, of exploited resources should be a differentiating criterion. IUCN urged distinction based on use, rather than purpose of initial taking.

**Digital Sequence Information:** SWITZERLAND and JAPAN opposed including digital sequence information. ECUADOR, the FSM, and MEXICO emphasized traceability. The US encouraged the sharing of digital sequence information in research and development (R&D); and, with CANADA, cautioned against including information under an ABS regime because of consequent reduction in data sharing and challenges in data tracking.

**Derivatives:** BANGLADESH, PNG, and INDONESIA, opposed by SWITZERLAND, the US, ICELAND, and JAPAN, preferred including derivatives. The FSM called for regulating derivatives and ensuring their traceability for monetary and non-monetary benefit-sharing purposes.

**Geographical Scope:** INDIA, ECUADOR, and INDONESIA recommended covering every aspect of MGRs in the Area and high seas, with MEXICO suggesting some differentiation for marine protected areas (MPAs). INDONESIA added that the ILBI should address jurisdictional overlaps.

ICELAND and the FSM recommended special consideration for MGRs straddling areas within and beyond national jurisdiction. VIET NAM called for consultations with coastal states for access to and collection of straddling MGRs.

**Status:** The EU emphasized that the ILBI negotiations do not depend on determining the legal status of MGRs. The AFRICAN GROUP stated that the common heritage is “much more than benefit-sharing” and underpins all elements of the package, with SOUTH AFRICA and P-SIDS highlighting: intra- and inter-generational equity; sufficient monetary benefits; capacity building; and MGRs as part of common heritage. Supporting the application of common heritage to MGRs in ABNJ, MEXICO noted the ILBI negotiation can benefit from experience under the Convention on Biological Diversity (CBD) and the Nagoya Protocol, suggesting assistance from the CBD Secretariat through a report and regulatory options. URUGUAY underscored: with COLOMBIA, the common heritage regime; and the need for consistency with the International Seabed Authority (ISA). The RUSSIAN FEDERATION supported applying the high seas freedoms to MGRs, including in the Area. The US stated that common heritage only applies to resources in the Area.

NORWAY favored a pragmatic, sustainable, fair, and cost-effective regime, considering links with future rules on capacity-building and technology transfer (CB&TT). BANGLADESH considered that neither common heritage or high seas freedoms are practically applicable, calling for a hybrid solution. FIJI proposed a *sui generis* regime for MGRs based on the ILBI overarching objectives and principles. Considering, with SWITZERLAND, common heritage and high seas freedoms not mutually exclusive, CARICOM highlighted: international cooperation and ecosystem-based management around the interconnectedness of the high seas and the Area. JAPAN recalled protracted negotiations on, and eventual exclusion of, sedentary species from the Area regime.

URUGUAY underscored coastal states' rights on the continental shelf, including the extended continental shelf. VIET NAM favored MGR regulation in the water column above extended continental shelves facilitating access by coastal states and respecting their sovereign rights. The HOLY SEE suggested applying the principle of due regard to "monetary or non-monetary interests" of other states, which establishes both rights and obligations to the Area and the high seas.

**Access:** The G-77/CHINA favored regulating access, excluding MSR, with terms and conditions to account for the possibility of change in use, and a requirement on CB&TT and on depositing samples, data, and related information available in open-source platforms. The AFRICAN GROUP proposed: distinguishing between MSR and bioprospecting in terms of access, with an obligatory prior notification system to regulate access to MGRs and to "track and trace" their use; and drawing on the Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). CARICOM preferred a notification system exploring potential interlinkages between access, area-based management tools (ABMTs) and environmental impact assessments (EIAs), and how ecologically or biologically significant marine areas (EBSAs), vulnerable marine areas (VMEs) or other specially protected areas should be taken into account. BRAZIL favored regulating access through a notice-based process, which would include disclosure of origin and purpose. P-SIDS suggested: for MGRs *in situ*, an ISA-type system of sponsoring states, emphasizing, with INDIA and CARICOM, traceability; leaving access to MGRs *ex situ* open, without privatizing samples; and a permit-based system under mutually agreed terms or a licensing system on MGRs *in silico*. TONGA stated that the content of the notice depends on type of activity and location. The PHILIPPINES stressed fair access, traceability, transparency, and public accountability, allowing for scientific and technological advances. FIJI emphasized recording and reporting mandatory requirements for *in situ* collectors, and a single-access regime with different provisions depending on the source of MGRs.

The EU favored free access to *in situ* MGRs, in line with UNCLOS provisions on MSR and Part XII (protection of the marine environment). MEXICO argued for: "dual regulation" of access for MSR and for commercial purposes, including a procedure for change of intent; public access to information; and conditions for the use of MGRs for commercial purposes. SWITZERLAND emphasized a "light access" structure supporting research and innovation.

CHINA supported: free access to MGRs; notification to the secretariat; and guidelines or codes of conduct on access, for adoption under domestic legislation. SINGAPORE called for a clearer understanding of bioprospecting vis-à-vis MSR. The REPUBLIC OF KOREA argued for free access in accordance with the high seas regime, to avoid hindering MSR and R&D in ABNJ.

The RUSSIAN FEDERATION stressed that there are no gaps in the regime governing access to MGRs, noting that fishing and living resource extraction for research on their genetic material should be carried out freely. NORWAY emphasized free access, expressing willingness to consider notification, with the IOC maintaining a repository. The HOLY SEE supported a simple, online registry for states and nationals to file a notification, whether for commercial or scientific intent, and pointed to the Organization for Economic Cooperation and Development (OECD) Guidelines for the Licensing

of Genetic Inventions for inspiration in considering *ex situ* and *in silico* access through licensing, calling for non-exclusive or co-exclusive licenses and mandatory sub-licensing.

COLOMBIA called for: access regulations for MGRs and derivatives; a global management institution; and a mechanism based on prior consent or notification. JAPAN and the US opposed regulating access to MGRs.

**Benefit-sharing:** The G-77/CHINA supported an ABS regime drawing on the Nagoya Protocol, the ISA and the ITPGRFA. SRI LANKA recommended governing benefit-sharing under the common heritage principle, drawing on the ISA. HONDURAS favored including monetary and non-monetary benefits. Underscoring mandatory benefit-sharing, P-SIDS requested paying royalties into an ILBI fund when a product developed from MGRs becomes profitable, without prejudice to scientific progress. She emphasized SIDS' special case and their participation in the ILBI, with different kinds of benefits accruing at different stages, as well as transparency, collection of data and scientific information, CB&TT, and coordination and cooperation. PNG underscored open access to scientific information, integration of open data linked to a clearinghouse, including information on the ecosystems, biochemical composition, and digital sequence information. The AFRICAN GROUP requested clarity on the stage when non-monetary benefits should be shared; and levying a fee when access to genetic sequence data is withheld. AOSIS supported fair and equitable sharing of monetary and non-monetary benefits at different stages, promoting MSR and technology transfer. CARICOM called for: equitable benefit-sharing based on a need assessment; knowledge dissemination; open research; report submission to a centralized organ; a traceability mechanism; and, with INDIA, a phased approach for benefit-sharing, including open-source samples and payments upon commercialization. MEXICO stated that all access to MGRs should lead to benefit-sharing, and supported, with CHINA and others, establishing a fund.

CHINA favored: prioritizing non-monetary benefits; sharing monetary benefits only upon large-scale commercialization; and providing incentives for MSR. BRAZIL called for: triggering benefit-sharing obligations upon commercialization, not in relation to research or patenting; and establishing a global fund derived from 1% of net revenue from the commercial use of MGRs.

CANADA queried the feasibility and impacts of a staged approach to royalties and its administrative burdens; supported linking benefit-sharing with capacity building; and urged taking into account the differences of other ABS instruments, as the ITPGRFA covers mostly genetic materials entirely in the public domain. JAPAN favored: benefit-sharing for current and future generations and R&D promotion; and voluntary capacity building and non-monetary benefits to enable all states to enjoy the benefits of MGRs. The US preferred non-monetary benefits to achieve the ILBI conservation objectives, focusing on developing countries' needs.

The EU suggested: focusing on "more readily available and feasible" non-monetary benefit-sharing; considering capacity building and sharing of material, information, and scientific knowledge; and requesting notification after MGR collection in ABNJ, including the possibility of sharing digital sequence information.

AOSIS highlighted the need to consider the Nagoya Protocol, the ISA, the World Health Organization's Pandemic Influenza Preparedness (PIP) Framework, and the World Trade Organization

(WTO) Agreement on Trade-related Aspects of IPRs (TRIPS). The EU drew attention to the Intergovernmental Oceanographic Commission (IOC) and the Global Environment Facility. The REPUBLIC OF KOREA called for pragmatic benefit-sharing arrangements, including on a voluntary basis and without undermining the high seas freedoms. The RUSSIAN FEDERATION noted that MSR is costly and is not always commercially viable; and favored voluntary benefit-sharing and capacity building.

**Beneficiaries:** AOSIS and COLOMBIA considered parties as beneficiaries. P-SIDS emphasized developing states, particularly SIDS. BRAZIL preferred including all states, especially developing countries and LDCs. The EU highlighted states that may require technical assistance. P-SIDS emphasized monetary and non-monetary benefits for traditional knowledge holders. TONGA suggested directing funds to the ILBI secretariat for administering ABNJ activities and for developing the clearinghouse. CHINA identified as beneficiaries all countries, in particular: LDCs; LLDCs, supported by PARAGUAY and NEPAL; as well as geographically disadvantaged states, SIDS, African states, and future generations.

**List of Benefits:** The G-77/CHINA supported a non-exhaustive list of benefits, with the PHILIPPINES and FIJI clarifying that it should include monetary and non-monetary benefits, and the AFRICAN GROUP making reference to the Nagoya Protocol. CARICOM also mentioned UNCLOS and the ITPGRFA, noting that the list could be annexed and reviewed. The EU, SWITZERLAND, and SINGAPORE expressed openness to consider an indicative list of non-monetary benefits. MEXICO proposed drawing from the ISA and the Nagoya Protocol. TONGA noted that benefits could include capacity building on the legal, policy, and financial aspects of the ILBI.

The US expressed willingness to consider a list of non-monetary benefits or benefit types. CANADA recommended finding the right balance in a non-exhaustive list. NORWAY called for flexibility and proposed matching needs and opportunities, noting relevant activities under the IOC.

**IPRs:** The G-77/CHINA called for considering the relationship with IPRs and traceability of any processing of MGRs. The EU, JAPAN, the US, and CHINA preferred excluding IPRs, arguing they are addressed under the World Intellectual Property Organization (WIPO) and the WTO. SWITZERLAND, SINGAPORE, and CANADA pointed to work under WIPO. The REPUBLIC OF KOREA emphasized respect for IPRs and confidential information. The RUSSIAN FEDERATION considered IPRs beyond the ILBI scope.

The AFRICAN GROUP suggested addressing IPRs through a *sui generis* system. AOSIS favored considering IPRs in a manner consistent with WIPO, opposing, with MEXICO, the patenting of MGRs themselves. The INTERNATIONAL COUNCIL FOR ENVIRONMENTAL LAW suggested “going beyond IPRs and direct monetary benefits” to design, implement, and monitor an ABS system that fosters MSR and collaboration. P-SIDS stressed the need to promote innovation, while setting specific requirements for patents, including prior informed consent (PIC). MEXICO recommended including: the object of IPRs; coordination with existing regimes, including WIPO; and verification of origin and use of MGRs. Noting that 84% of MGR patents are registered by

corporations and 12% by universities, PNG queried how the ILBI will address non-state actors, pointing to potential lessons learned from the Nagoya Protocol and the ITPGRFA. PERU called for the ILBI not to run counter to IPR protection. The HOLY SEE doubted the success of any attempt to include IPRs in the ILBI as this would interfere with sovereign rights. COLOMBIA preferred addressing disclosure of origin under WIPO and TRIPS, with the ILBI ensuring complementarity with those regimes through general clauses.

**Traditional Knowledge:** AOSIS highlighted: the Nagoya Protocol approach to traditional knowledge associated with genetic resources; a requirement under the ILBI for PIC of indigenous peoples and local communities before accessing their traditional knowledge if it contributes to knowledge of ABNJ; and MGRs as part of common heritage, triggering equitable benefit-sharing obligations.

**Clearinghouse:** AOSIS supported the establishment of an accessible clearinghouse, taking into account the special circumstances of SIDS and LDCs. The EU favored using and enhancing existing mechanisms, in addition to a clearinghouse. CARICOM supported a clearinghouse, as part of a “track and trace” mechanism, managed by the IOC, noting the role of the ISA and others, linked to global, regional, and private networks. MEXICO supported a clearinghouse for storing, processing, and disseminating technical and scientific information, highlighting the IOC and the Nagoya Protocol.

ARGENTINA suggested including in a clearinghouse genetic sequence data of collected resources. TONGA said the clearinghouse could include an information portal, notice of upcoming *in situ* collections, and information triggering EIAs. CHINA favored a clearinghouse to facilitate the sharing of data, materials, and information, promoting cooperation and compliance among parties. SWITZERLAND and NEPAL favored a single clearinghouse with different parts addressing different ILBI elements. FIJI called for a multi-purpose clearinghouse, ensuring methodological consistency, compatibility in data reporting, timely reporting, and transparency. The HOLY SEE suggested that a clearinghouse make license opportunities and agreements accessible, categorizing the types of available licenses, as well as digital or genetic information involved, and anti-trust provisions to prevent undue influence by a single country or corporation.

### ***In the Corridors***

Well-known diverging positions resurfaced during the deliberations on MGRs. “We are hearing the same old entrenched viewpoints on monetary benefit-sharing and IPRs,” noted a veteran, recalling similar obstacles during the negotiations of the Nagoya Protocol. Another skeptical participant remarked, “we need to spell out what we mean exactly when we say that common heritage and high seas freedoms are not mutually exclusive.” Discussions on MGRs *in silico* also brought flashbacks from the July intersessional discussions under the CBD on digital sequence information, which ended up in a heavily bracketed text that, as one delegate remarked, seems unlikely to be resolved in its entirety during the November CBD COP. An expert quipped, “delegations need to do more homework on this issue, as there is less room for creative ambiguity under the ILBI than under the Nagoya Protocol.”