

MARINE BIODIVERSITY WORKING GROUP HIGHLIGHTS: WEDNESDAY, 30 APRIL 2008

The second meeting of the *Ad Hoc* Open-ended Informal Working Group of the General Assembly to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction (the Working Group) convened for its third day on Wednesday, 30 April, at the United Nations (UN) headquarters in New York. The Working Group addressed the issues identified in General Assembly resolution 61/222 on genetic resources beyond national jurisdiction and the existence of governance and regulatory gaps.

GENERAL ASSEMBLY RESOLUTION 61/222

GENETIC RESOURCES BEYOND NATIONAL

JURISDICTION: The EU called for an integrated approach, urged focusing on practical and concrete steps, and highlighted the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) as a relevant model for addressing marine genetic resources (MGRs). CANADA said that the Working Group was the appropriate forum for discussing MGRs beyond national jurisdiction. She called for realism concerning the level of activity occurring, costs and risks, and uncertainty regarding financial dividends. JAPAN concurred with Canada that MGRs are covered under Part XI (the Area) of UNCLOS, and agreed to study the EU proposal.

SOUTH AFRICA, supported by MEXICO, stressed the relevance of the common heritage of mankind principle. He expressed caution regarding the EU's reference to the ITPGRFA, citing the challenges inherent in applying it to shared resources beyond national jurisdiction.

MEXICO proposed ways to promote cooperation in research on MGRs. VENEZUELA opposed the commercial exploitation of MGRs, explaining it contravened the Rio and CBD Principles on equitable benefit-sharing and environmental conservation.

NORWAY called on countries to also regulate MGRs within their own jurisdictions, and said as MGRs fall under the UNCLOS provisions on the conservation and management of the living resources of the high seas, any new regime would require broad support.

The US disagreed with the calls for new international regulation, arguing that MGRs fall under the high seas regime of UNCLOS. She also disagreed with the contention that MGRs are part of the common heritage, but emphasized the importance of research in MGRs, the significance of these resources for knowledge and livelihoods and the need for capacity building in developing countries. AUSTRALIA expressed reservations with the need for a new regime for bioprospecting beyond national jurisdiction and instead supported voluntary codes of conduct.

BRAZIL discussed its commitment to the environmental protection provisions of codes of conduct being developed by the International Seabed Authority, and urged cooperation on capacity building. CHINA called for technology transfer and capacity building in developing countries, and expressed concern with overregulation. ARGENTINA prioritized the issue of access and benefit-sharing over the development of a regime. TRINIDAD AND TOBAGO reiterated that high seas genetic resources are part of the common heritage of mankind. VENEZUELA underscored the inability of market incentives to solve environmental problems and stressed the need for creativity in developing a mechanism that would conserve and guarantee fair and equitable distribution of benefits.

The EU clarified its proposal was to use the ITPGRFA as a model for further consideration. The US noted that all countries benefit from the development of products, and said negotiation of a benefit-sharing regime was unnecessary. She suggested that the most productive approach for the Working Group would be to focus on practical areas for potential agreement. SOUTH AFRICA acknowledged that UNCLOS is relevant to MGRs in oceans, but stressed marine organisms found on the deep sea bed are governed by the principle of the common heritage of mankind.

ICELAND, supported by ARGENTINA, urged parties to seek common ground and focus on contributions that could unite participants. He called for practical, fair and equitable solutions and said the EU proposal to use ITPGRFA as a model warranted attention. KENYA stressed a legal regime was the only appropriate way of sharing benefits of MGRs.

IUCN suggested that states give advance notification of all activities in the high seas that might lead to degradation of marine biodiversity beyond national jurisdiction. He noted that

EIAs need not be onerous and proposed that collection of genetic resources be accompanied by information gathering on the associated impacts of collection, purpose of collection and other labeling criteria. He suggested that the ITPGRFA could provide a good example of a benefit-sharing system. FAO discussed its established commission on genetic resources for food and agriculture, covering aquatic resources, and its past and future work. United Nations University (UNU) described its web-based information tool on biological prospecting and a document published with UNESCO, which summarizes this tool. She noted the challenges inherent in finding information on the location of MGR collection. WWF argued that all researchers, whether scientific or commercial, should be subject to EIAs, as the means of research could degrade marine biodiversity.

EXISTENCE OF A GOVERNANCE OR REGULATORY GAP: FEDERATED STATES OF MICRONESIA highlighted by-catch and bottom trawling as issues of concern, and welcomed continued discussion of Resolution 61/105 on Sustainable Fisheries. CANADA called for effective implementation of and compliance with existing instruments, RFMO reform, capacity building, fulfillment of mandates and the coordination of scientific advice.

The EU identified an implementation agreement under UNCLOS as a medium-term measure to address gaps, as well as several short-term initiatives, including: addressing destructive fishing practices, IUU fishing and by-catch; expanding the geographic coverage of RFMOs; adopting a conservation-oriented approach and performance reviews of RFMOs; and strengthening flag- and port-state mechanisms. He supported the establishment of an expert working group to develop EIA guidelines, an integrated scientific assessment in an intergovernmental setting, and international guidance on the use of impact assessments on MGRs. Concerning MPAs, he supported the development of a list of areas in need of protection and the establishment of pilot MPAs. He suggested the Working Group reconvene in 2009 and report to UNGA at its 64th session.

AUSTRALIA expressed willingness to consider new arrangements or regulatory approaches that could address implementation gaps. She highlighted the need for universal participation in existing instruments and called for updating RFMO mandates, efforts to establish a representative network of MPAs, national prior assessments of unregulated activities, and precautionary approaches. She underscored the Commission for the Conservation of Antarctic Marine Living Resources as a best practice model.

The US, NORWAY and JAPAN reiterated that there was no governance gap on marine resources beyond national jurisdiction. The US argued that MGRs are covered by UNCLOS; no single institution could address the myriad of issues identified for action; and all the issues raised are covered under the existing institutions. NORWAY proposed increasing compliance of and collaboration within existing institutions instead, while JAPAN favored enhancing effective implementation of existing instruments, promoting cooperation and coordination among RFMOs, and building on sectoral initiatives to create an

integrated global approach. ICELAND highlighted governance gaps, but stressed it saw no regulatory gaps, and questioned the need for a new implementation agreement.

Recalling the history of UNCLOS and its provisions, Antigua and Barbuda, on behalf of the G-77/CHINA, also claimed that there is no governance gap, but rather an implementation deficit, which could be addressed through coordination and cooperation, drawing on inputs from the CBD and UNCLOS, with a focus on capacity building and technology transfer.

SOUTH AFRICA clarified that given the existence of UNCLOS, there is no regulatory gap in a narrow sense; however, its “broadness” leaves it open to interpretation. He suggested the development of soft law under UNGA to deal with the perceived gap.

Noting a treaty fatigue among small island developing states, MARSHALL ISLANDS proposed developing a toolbox using existing mechanisms or informal agreements to harmonize action, and designing EIA guidelines for key activities or, at least, conducting further analyses on the barriers and benefits of EIA application.

BRAZIL said the establishment of MPAs on the high seas would require the agreement of all parties. CHINA favored the implementation of UNCLOS, the use of EIAs and strengthened cooperation and coordination of international organizations.

NEW ZEALAND noted existing governance and regulatory gaps, suggested the issue of implementation gaps as a separate agenda item in the Working Group’s future work programme, and expressed interest in, *inter alia*, proposals on the establishment of MPAs on the high seas. The RUSSIAN FEDERATION said consideration of a new legal instrument would require serious review and consideration of the two existing implementation agreements to UNCLOS.

IN THE CORRIDORS

Delegates approached the third day with spring in their step, and the meeting enjoyed a convivial atmosphere. The Working Group moved rapidly through discussions on MGRs, an issue many had anticipated as potentially difficult. They were able to make quick progress because of delegates’ willingness to leave thorny issues – such as the legal interpretation of various matters – for other meetings and bodies and, instead, focus on the few specific practical areas. The principle of the common heritage of mankind remained a contentious issue.

Despite the optimistic atmosphere in the morning session, most acknowledged that the Working Group’s coverage of governance gaps wouldn’t be “plain sailing.” Discussions on gaps left some “all at sea”: while a few delegates discussed gaps generally, others conflated governance and regulatory gaps, and some delegates took the time to make specific distinctions among governance, regulatory and implementation gaps. Simmering in the background of these discussions was whether the Working Group fulfilled an important governance gap itself, especially considering the potential overlap with the ICP process, and, accordingly, what the future of the Working Group and ICP would look like.