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PrepCom 1

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PREPCOM 1 HIGHLIGHTS: FRIDAY, 1 APRIL 2016

On Friday, 1 April, the informal working group on MGRs continued in the morning. In the afternoon, the PrepCom plenary reconvened briefly, followed by an informal working group on ABMTs, including MPAs, facilitated by John Adank (New Zealand).

INFORMAL WORKING GROUP ON MGRS

DEFINITIONS AND SCOPE: P-SIDS supported a broad definition of MGRs, ensuring adaptability to emerging knowledge and technology. CANADA called for a narrow approach to the scope of ABS as it relates to MSR. PERU focused on the distinction between MSR and bioprospecting.

FIJI pointed to definitions under the CBD, Nagoya Protocol and ITPGR, noting that under existing regimes, benefit-sharing provisions are not fully operationalized. IUCN urged aligning the definition of MGRs with the CBD to avoid unintentional non-compliance, and including scientists in the PrepCom work on definitions. ICELAND cautioned against drawing definitions from other treaties that may not fit the BBNJ context. CHILE, with P-SIDS, suggested differentiating between fisheries as a commodity and as a source of genetic information, with BRAZIL pointing to CBD Article 2 to help with this distinction.

ACCESS: The EU stressed that access to MGRs should be environmentally sound. P-SIDS supported including access to resources, as well as to biological data. The G-77/CHINA underscored interrelations between *in situ*, *ex situ* and *in silico* access and resources falling under the benefit-sharing regime, with CHILE explaining that *in silico* access refers to genetic resources in digital form. ARGENTINA stressed: the need for an ABS system to cover all research activities, including *in silico* access; and as useful models the ISA and ITPGR, which could be adjusted to the MGR context. CANADA cautioned against prohibiting or appearing to prohibit MSR, or, with the US, creating a new regime for MSR. BRAZIL pointed to challenges concerning MGR traceability.

BENEFIT-SHARING: The G-77/CHINA highlighted monetary and non-monetary benefit-sharing, noting that common heritage should underpin the regime on MGRs. CHILE referred to UNCLOS Part XI (the Area). P-SIDS pointed to technology transfer, information sharing and capacity building as benefits, highlighting the need for flexibility to ensure fair and equitable distribution. COSTA RICA suggested making the ISA responsible for administering the benefit-sharing regime, and, with JAMAICA, establishing a clearinghouse. The RUSSIAN FEDERATION argued that including MGRs under ISA's mandate would entail a violation of UNCLOS.

PERU pointed to: the ITPGR as a general model only; provisions on non-monetary benefits under UNCLOS and the Nagoya Protocol; and the need for an institutional framework to address monetary benefit-sharing. BARBADOS suggested: a framework promoting partnerships among SIDS' institutions and private companies; a central repository facilitating access to MGRs; and discussion of potential disincentives for MSR.

TRINIDAD AND TOBAGO underscored: the "fair and equitable" dimension of benefit-sharing, and, supported by the AFRICAN GROUP, the centrality and non-derogable nature of the common heritage principle; the need for an institutional mechanism ensuring accountability, monitoring and compliance with the ABS regime, expressing skepticism about a "light" approach; and the need to protect the rights of states with claims to the outer continental shelf. JAMAICA drew attention to Article 10 of the Nagoya Protocol (global multilateral benefit-sharing) and, with the EU, to its Annex (monetary and non-monetary benefits) as well as, supported by the AFRICAN GROUP, to UNCLOS Article 82 (payments from the exploitation of the outer continental shelf) as guidance on equitable criteria.

NORWAY favored an ABS regime based on best available scientific information and commercial profit-making within the limits of sustainability; and, with AUSTRALIA, explained that a "light" approach would not create obstacles to MSR or other activities in ABNJ, recalling the link between benefit-sharing and the overall goal of BBNJ conservation. Favoring minimum restrictions on a case-by-case basis on MSR, JAPAN, with the US, cautioned against renegotiating UNCLOS with regard to common heritage. COSTA RICA, supported by BRAZIL, MEXICO and the AFRICAN GROUP, explained that the ILBI is addressing gaps under UNCLOS, clarifying that common heritage governs MGRs in all ABNJ. Noting that the legal status of MGRs in ABNJ is not a precondition for regulating access, the EU preferred a pragmatic approach, building on existing efficient regimes, including the ITPGR Multilateral System as a source of inspiration. JAPAN underscored that existing ABS mechanisms, such as under the ITPGR, are not based on common heritage.

The EU noted the Tara Expeditions as an example of non-monetary benefits by making publicly available research on MGRs. AUSTRALIA emphasized the need to include access to research opportunities, pointing to fairness and equity as the underpinnings of a benefit-sharing "structure." MEXICO noted the appeal of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to ensure effective dissemination of MSR related to MGRs.

IPRs: The G-77/CHINA highlighted IPR issues. IRAN, supported by the AFRICAN GROUP, underscored the need for patent disclosure to ensure transparency, predictability and compliance with a fair and equitable benefit-sharing regime

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based on common heritage. JAMAICA noted the constraints under the ITPGR with respect to chemical and pharmaceutical uses, and IPRs. The EU, supported by the US and JAPAN, cautioned against discussing IPRs in this forum, given the mandates of the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). PAPUA NEW GUINEA proposed addressing process and requirements for IPRs related to MGRs. JAMAICA noted the need not to duplicate WIPO's work, but called for further discussion on IPRs in relation to commercialization of MGRs. INDONESIA recommended discussion of mandatory disclosure. Noting that a mandatory disclosure requirement could exist under patent law, the EU referred to the ITPGR's Standard Material Transfer Agreement including IPRs, cautioning against including IPRs as such in the ILBI text.

INFORMAL WORKING GROUP ON AREA-BASED MANAGEMENT TOOLS

DEFINITIONS: JAMAICA, with JAPAN, NEW ZEALAND and IUCN, pointed to IUCN's definition of MPAs; and distinguished sectoral ABMTs such as MARPOL Special Areas and VMEs, from cross-sectoral ABMTs, including MPAs and marine spatial planning (MSP). COSTA RICA supported the definition of single-, multi- and cross-sectoral ABMTs. GREENPEACE, PEW, NRDC, WWF, HIGH SEAS ALLIANCE and OCEAN CARE noted that the IUCN definition of MPAs is widely accepted, specific, clear and broad enough to encompass different MPA categories.

JAMAICA, BRAZIL and NEW ZEALAND suggested using an adapted version of the CBD definition of MPAs. AUSTRALIA recalled that the CBD Technical Expert Group on Marine and Coastal Protected Areas has an MPA definition. The EU noted the lack of a universally accepted definition for MPAs, calling for tailoring existing definitions to specific needs.

Some delegations noted that MPAs are a type of ABMTs. SINGAPORE proposed taking into account in the characterization of ABMTs a range of tools, including MSP, as well as existing descriptions of MPAs. FSM suggested defining spatial and regulatory characteristics of ABMTs. The US suggested that the MPA definition should be sufficiently broad to encompass specific types of conservation and impact restrictions, depending on the management body in question, such as RFMOs. FSM highlighted the difference between VMEs and EBSAs, noting that they are not ABMTs but could be used in the definition of MPAs and other tools. NEW ZEALAND suggested including different categories of MPAs.

OBJECTIVES: NORWAY noted that the objective of ABMTs is regulating activities for the protection of BBNJ, and suggested focusing on the extent activities must be restricted to reach agreed protection levels. The EU, supported by COSTA RICA and MONACO, recommended creating a global MPA network contributing to the ILBI overall objective of conservation and sustainable management of the marine environment. IUCN suggested incorporating in the ILBI objective language from the Rio+20 outcome document "The Future We Want."

PRINCIPLES: The G-77/CHINA and the EU underscored the precautionary and ecosystem approaches as basic governance principles. Noting that UNCLOS provisions are vague, the AFRICAN GROUP called for balancing the high seas freedoms and the duty to protect and preserve the marine environment, and for coordination between existing mechanisms and those to be established under the ILBI to create MPAs. ALGERIA highlighted transparency, accountability and cooperation. CHILE drew attention to UNFSA principles. P-SIDS emphasized

integrated management, and the need to avoid disproportionate burdens on SIDS. The EU, MONACO and COSTA RICA referred to the polluter pays principle.

CRITERIA: JAMAICA and IUCN highlighted the EBSA criteria and CBD guidelines on MPA networks, with JAMAICA noting that several CBD decisions address MPAs in ABNJ, recognizing UNCLOS as the appropriate forum. MONACO called for establishing MPAs in vulnerable areas and important areas for certain species. NEW ZEALAND and AUSTRALIA suggested establishing MPAs to address particular threats and ensure representativity. The PHILIPPINES proposed as criteria for selecting areas: biodiversity richness, biophysical connectivity, and, supported by BRAZIL, importance of ecosystem services for food security and climate resilience. The EU suggested considering existing experiences and approaches, including EBSAs, relevant regional seas conventions, and national initiatives.

GOVERNANCE: The EU underscored the absence of an overarching mechanism establishing MPAs in ABNJ, noting that currently active organizations' mandates have spatial and substantive limitations and that international commitments on MPAs must be respected. COSTA RICA proposed the creation of a global MPA network.

BANGLADESH called for MPA enforcement measures, and a scientific body under the ILBI to clarify the definition of MPAs. JAPAN outlined RFMOs' establishment of no-fishing zones and *de facto* MPA designation if fishing vessels encounter VMEs, and recommended including presentations by RFMOs at PrepCom 2.

The EU clarified that proposals for MPAs establishment should: be based on principles and criteria to be set by the ILBI; be made by state parties collectively, including through existing organizations, or individually, suggesting that civil society's role should be considered in this process; and contain: spatial boundaries, conservation objectives, identification of threats, and priority elements for a management plan. She noted the need to consider a process for endorsing existing MPAs under the ILBI.

FSM suggested: establishing a scientific committee collating information on EBSAs, VMEs and PSSAs for identifying areas in need of protection; ensuring transparency and consultations with all relevant stakeholders and adjacent states; avoiding undermining national efforts in adjacent waters through ABMTs in ABNJ; and allowing both permanent and temporary MPAs. IUCN stressed the need to integrate conservation and sustainable use in decisionmaking, and to introduce measures aimed at minimizing adverse impacts.

IN THE CORRIDORS

Following a slightly hesitant ice-breaking session on Thursday afternoon, the PrepCom's informal working group on MGRs reached full speed on Friday, resulting in lively exchanges on a wide-range of sources of inspiration for a potential new, specialized ABS regime under the ILBI.

Not keen on reinventing the wheel, some drew insight from agreed definitions under the CBD and Nagoya Protocol, and others pointed to the multilateral approach to facilitated access and benefit-sharing, and standard contracting, under the ITPGR. Those emphasizing fairness and equity considerations pointed to existing obligations and criteria under UNCLOS relevant to benefit-sharing. The "realists" called attention to the only partial fulfilment of existing benefit-sharing obligations, including because of the growing reality of bio-informatics. And as to the usual (rather large) elephant in the room – IPRs, some of the ILBI "enthusiasts" that will sacrifice part of their weekend at an IUCN workshop on MGRs may find creative ways forward.