



Earth Negotiations Bulletin

PrepCom 1

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PREPCOM 1 HIGHLIGHTS: THURSDAY, 7 APRIL 2016

On Thursday, 7 April, the PrepCom plenary met throughout the day to complete a round of comments on oral reports from informal working groups, and to consider: the scope of an international legally binding instrument (ILBI) on marine biodiversity of areas beyond national jurisdiction (BBNJ); its relationship with other instruments and bodies; guiding approaches and principles; and institutional and dispute-settlement mechanisms.

REPORTS OF INFORMAL WORKING GROUPS

ALGERIA reiterated the need to: preserve the interests of peoples that have not acquired full independence; adopt a code of conduct for a clearinghouse mechanism; and address “development and transfer” of technology.

SCOPE OF THE ILBI

The G-77/CHINA considered the ILBI’s geographical, substantive and functional scope critical for determining how not to undermine existing instruments. Stressing that the whole set of rights and obligations under UNCLOS should be respected, the EU noted that the issue of scope is complex and cuts across the whole package. COSTA RICA, supported by many, suggested convening an informal working group on scope and related definitions at future PrepCom sessions. ECUADOR suggested an informal working group on principles, scope, cooperation with other arrangements, and concerns of non-parties to UNCLOS.

MEXICO underscored the need for complementarity in scope. NEW ZEALAND: reiterated that fisheries should be included in the ILBI, but the question is “how”; called for giving effect to UNCLOS obligations on cooperation on a global or regional basis; and suggested that if a working group be created, it focus on crosscutting issues related to the PrepCom’s mandate, rather than scope. The US noted that a general discussion on scope will not “get us very far,” and called for a pragmatic approach. ICELAND recommended discussing scope in relation to specific threats and how they are addressed by existing organizations. BANGLADESH proposed the ILBI cover new discoveries and organisms in ABNJ and better explain UNCLOS provisions to ensure BBNJ conservation and sustainable use. IUCN emphasized the need for the broadest scope possible to prevent new gaps from emerging in the near future.

RELATIONSHIP WITH EXISTING INSTRUMENTS AND BODIES: The RUSSIAN FEDERATION called for a practical approach on the need for the ILBI not to “undermine” existing instruments and bodies, focusing on specific examples. The AFRICAN GROUP cautioned against overstating concerns about undermining other instruments. COSTA RICA highlighted

the need to: address existing gaps, while respecting mandates of other bodies; and harmonize requirements and standards to enable coordination, as the status quo is unacceptable. NORWAY identified, as a crosscutting issue, filling gaps without undermining other instruments.

AUSTRALIA recalled that General Assembly Resolution 69/292 recognizes the need not to “undermine instruments, frameworks and relevant bodies,” which does not mean that there should be no relationship between the ILBI and these instruments and bodies; and, with CHILE, pointed to the relationship between UNFSA and UNCLOS. JAMAICA recalled: UNCLOS Article 237 (obligations under other conventions on the protection of the marine environment); with FIJI, UNCLOS Article 311 (relation to other instruments and international agreements); and CBD Article 22 (relationship with other conventions). FIJI pointed also to UNFSA Articles 4 (relationship with UNCLOS) and 44 (relation to other agreements).

ARGENTINA noted: challenges associated with the inter-relationship between agreements and dispute-settlement procedures, and the possible need to change existing mandates, such as ISA’s. CANADA, with JAPAN, the US and the RUSSIAN FEDERATION, cautioned against concluding that certain relationships would not alter rights and obligations under existing agreements, due to insufficient information yet in the process. MONACO noted that the ILBI is under UNCLOS, and UNCLOS rights and relationships must be respected.

THE PHILIPPINES underscored, with NEW ZEALAND, states’ rights over the continental self, and called for mutually supportive activities with other conventions, like the CBD. SRI LANKA noted the ILBI must complement UNCLOS and other related instruments. ARGENTINA argued that the ILBI cannot undermine something that does not exist, such as a universally accepted instrument on MPAs. CHINA underscored that the ILBI should supplement UNCLOS and fill legal gaps, building upon existing practices. BELIZE stressed that “not undermining” is not synonymous with “not discussing,” underscoring the need to identify overlaps and fragmentation. IUCN stressed that establishing a global structure to manage BBNJ is different from replacing current structures. JAPAN noted existing criteria to determine when other organizations are undermined.

MEXICO proposed the “roadmap” address relationships with other instruments, dispute settlement and final provisions. ERITREA suggested mapping relevant instruments, and enabling and disabling mechanisms derived from these relationships. CAMEROON suggested the PrepCom Chair prepare a document to provide a platform for further discussions at PrepCom 2.

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Chair Charles clarified that the PrepCom 1 summary will not be a negotiated document, but incorporate his reflections on the session.

PRINCIPLES AND APPROACHES

Noting that the new regime should be built upon the common heritage principle, the G-77/CHINA highlighted UNCLOS principles and approaches, including high seas freedoms, as well as precautionary, ecosystem and science-based approaches. The AFRICAN GROUP emphasized the applicability of the common heritage principle, noting that it is non-derogable and pointing to ISA as its “home.” BANGLADESH, supported by TRINIDAD AND TOBAGO, argued that including fish as marine genetic resources (MGRs) under the common heritage principle for sharing benefits will not undermine UNCLOS. TRINIDAD AND TOBAGO opined that UNCLOS may be rather undermined by the alternative approach based on high seas freedoms, as it may influence the effective balance between conservation and sustainable use. BELIZE considered common heritage also as an ethical concept, which incorporates the need to preserve the environment. CHILE proposed that MPAs are common heritage of mankind as they are intended to benefit the entire international community. COSTA RICA emphasized that high seas freedoms are not absolute under UNCLOS.

JAPAN, with the US, cautioned against focusing on common heritage with regard to living resources, preferring a pragmatic approach. The EU cautioned against counterproductive, theoretical discussions, calling for discussion of concrete measures.

The FEDERATED STATES OF MICRONESIA (FSM) noted that the polluter pays principle is simpler in the BBNJ context than in the climate change regime, as more actors are involved in the latter. P-SIDS underscored that disproportionate burdens of conservation measures should not be placed on developing states, noting that guidance can be drawn from the principle of proportionality. The EU underscored: the obligation to protect the marine environment; a science-based approach; the ecosystem and precautionary approaches; intergenerational equity as part of the sustainable development principle; and the need to respect the whole balance of UNCLOS rights and obligations. He also highlighted the issue of disproportionate burdens, noting that it will be addressed at the UNFSA Resumed Review Conference. The PHILIPPINES noted conservation and sustainable use are not inconsistent with each other, pointing to the need to balance them with economic development.

IUCN suggested: giving equal weight to state responsibilities in exercising the high seas freedoms; reconciling economic development with environmental protection, balancing rights and interests of users and those of the international community; referencing intra- and inter-generational equity, fair and equitable benefit-sharing from the utilization of MGRs of ABNJ, capacity building, technology transfer and sharing of scientific knowledge; and ensuring international responsibility for all activities under national control or jurisdiction. GREENPEACE, PEW, WWF, NRDC, OCEAN CARE and the HIGH SEAS ALLIANCE stressed transparency, the polluter pays principle and ecosystem-based management, highlighting the need to establish procedures for stakeholder participation, instead of engaging in an exercise to identify these stakeholders. IUCN highlighted the need for criteria on stakeholder inclusion in EIAs.

On the placement of principles within the ILBI text, the AFRICAN GROUP suggested reflecting some principles both in the preamble and in the operative section. COSTA RICA and AUSTRALIA favored reflecting principles early in the operative section.

INSTITUTIONAL ASPECTS

Many pointed to ISA’s experience. Recalling suggestions to ISA to monitor BBNJ by expanding its mandate to include living resources, the AFRICAN GROUP, with BANGLADESH, noted that this cost-effective option should be considered. He suggested, supported by FSM, that two distinct divisions be formed within the ISA to deal with living resources and non-living ones, respectively. Noting that UNCLOS non-parties’ concerns need to be accommodated, BANGLADESH recalled UNCLOS Article 164 on an ISA economic planning commission, suggesting that it be tasked to address living resources under the common heritage principle.

The US cautioned against deciding on the organization of an institutional mechanism before addressing its scope and tasks, stressing that expanding the ISA’s mandate may provide a disincentive for UNCLOS non-parties to participate in a benefit-sharing regime. COSTA RICA noted that if ISA is used, a parallel mechanism will be necessary to ensure full representation of all ILBI parties, including those that are not parties to UNCLOS.

COSTA RICA proposed further discussions of an oversight mechanism, ensuring monitoring, review and compliance with EIAs. CHILE highlighted the principle of cost-effectiveness. MEXICO proposed discussing liability, including in relation to UNCLOS provisions on responsibility and liability with regard to the Area.

DISPUTE SETTLEMENT: CHILE, with INDONESIA, AUSTRALIA and FSM, stressed that dispute-settlement mechanisms under UNCLOS and UNFSA provide a satisfactory framework, suggesting consideration of additional mechanisms for solving disputes of a more technical nature. INDONESIA pointed to the ISA dispute settlement as a model. BANGLADESH proposed including the UNCLOS special arbitration procedure under the ILBI.

PERU queried the type of disputes that could arise under the ILBI. NEW ZEALAND noted the need to clarify the ILBI’s obligations in order to understand what disputes might arise. BANGLADESH highlighted possible disputes over MGRs between states or contractors, or on access to MGRs in the same area, or, with COSTA RICA, jurisdictional disputes when conducting EIAs. COSTA RICA pointed also to possible disputes over ABMTs. FSM noted that under UNFSA, a formal tribunal is not always necessary, as technical matters are settled by experts.

IN THE CORRIDORS

On its penultimate day, the PrepCom’s discussions on the scope and principles of a new instrument brought to the surface well-known divides on the common heritage principle and on the relationship with existing instruments. Amidst a widespread feeling of déjà vu, some participants feared they were brought “back to the past” – to the abstract, largely circular, discussions of the BBNJ Working Group. The proponents of a pragmatic approach thus argued that the scope could be worked out progressively, by ironing out the details of the substantive body of the instrument first. For others, however, the scope would need to be discussed early on, to give direction to more detailed negotiations, and comfort some delegates.

With questions remaining on the shape of the roadmap expected to emerge on the last day of PrepCom 1, some BBNJ veterans felt that figuring out how the process will evolve may be key to make substantive progress on the elements of the package.

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of PrepCom 1 will be available on Monday, 11 April 2016, online at: <http://www.iisd.ca/oceans/bbnj/prepcom1/>