



# Earth Negotiations Bulletin

PrepCom 2

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Vol. 25 No. 109

Published by the International Institute for Sustainable Development (IISD)

Monday, 29 August 2016

## PREPCOM 2 HIGHLIGHTS: FRIDAY, 26 AUGUST 2016

On Friday, 26 August, the plenary of PrepCom 2 convened in the morning, followed by an informal working group on MGRs that met for the rest of the day.

### OPENING PLENARY

Opening the session, Chair Eden Charles (Trinidad and Tobago) called on delegations to build on the work done at PrepCom 1, highlighting an indicative list of questions circulated prior to PrepCom 2 to guide discussions. He suggested “parking” issues on which there is or seems to be consensus at PrepCom 2, for the PrepCom to discuss at a future session focusing on recommendations to the General Assembly. Stephen Mathias, Assistant Secretary-General, Office of Legal Affairs, expressed appreciation for the contributions to the Voluntary Trust Fund from the Netherlands and New Zealand.

**ORGANIZATIONAL MATTERS:** Chair Charles introduced, and delegates approved, the provisional agenda (AC.287/2016/PC.2/L.1) with an oral amendment to add an agenda item on the election of bureau members to replace Giles Norman (Canada) and Kaitaro Nonomura (Japan), as well as the programme of work (AC.287/2016/PC.2/L.2). Chair Charles noted that, following the programme of work of PrepCom 1, informal working groups will reconvene at PrepCom 2 with the same facilitators.

### INFORMAL WORKING GROUP ON MGRS

**DEFINITIONS:** COSTA RICA: supported by Barbados for the Caribbean Community (CARICOM), the PHILIPPINES and others, highlighted the definitions contained in the CBD, the Nagoya Protocol and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR); and suggested as a possible working concept of MGRs “material and/or data of marine plant, animal, microbial or other origin, derivatives and/or data thereof found in or originating from the high seas or the Area, containing functional units of heredity with actual or potential value of their genetic properties.” The Federated States of Micronesia (FSM), supported by CARICOM, ALGERIA, SINGAPORE and the PHILIPPINES, suggested adapting CBD Article 2 by including the word “marine.” MAURITIUS suggested defining MGRs as “resources extracted from living organisms in the sea, including fish species and marine plants, recognized as forming part of marine biodiversity.” Thailand for

the Group of 77 and China (G-77/CHINA) noted the Group is still considering different definitions, including adapting existing definitions.

AUSTRALIA highlighted the need for coherence, favoring a definition that combines CBD and Nagoya Protocol definitions. The EU favored the definitions contained in CBD Article 2 and in the Nagoya Protocol. NEW ZEALAND preferred definitions from the Nagoya Protocol. JAPAN considered the discussion on definitions premature. SINGAPORE, CANADA and NEW ZEALAND called for working definitions which can be reviewed as discussions progress. IUCN proposed starting with a definition similar to that under the CBD, as scientists are already familiar with it in their practice.

**Fisheries:** South Africa for the AFRICAN GROUP called for the definition of MGRs to include fish. BANGLADESH reminded delegates that under the CBD, genetic material means any material of plant, animal, microbial or other origin containing functional units of heredity. COSTA RICA clarified that fisheries as biological resources, in contrast to genetic resources, or as commodities were not included in his proposed definition of MGRs. IUCN favored differentiating fish used as a commodity.

The US, supported by CANADA, ICELAND and the REPUBLIC OF KOREA, stressed that fish used for their genetic properties should be treated as any other organism used for the same purpose, but fish used as a commodity is addressed by other legal frameworks. JAPAN underscored that biological resources used as commodities in trade are out of the scope of the ITPGR and the CBD. The RUSSIAN FEDERATION opposed including fish under the ILBI, noting that living resources cannot fall under the common heritage principle, and cautioned against using definitions from the CBD or the Nagoya Protocol, as the scope is different.

**Derivatives and data:** CHINA stressed that the CBD definitions of genetic resources and genetic material mainly relate to materials within national jurisdiction; and that there is no consensus on including derivatives. The REPUBLIC OF KOREA underscored the need to distinguish between genetic resources and derivatives. The US underlined that MGRs should be limited to material from living organisms and not include organisms generated from MGRs or genetic sequencing data. JAPAN argued that acquiring genetic information from another country without the genetic resource falls out of the scope of the Nagoya Protocol, and that genetic data should not be included in the ILBI. IUCN recommended including *in situ*, *ex situ* and

This issue of the *Earth Negotiations Bulletin* © <enb@iisd.org> is written and edited by Elisa Morgera, Ph.D., Daniela Diz, Ph.D., Tallash Kantai and Asterios Tsioumanis, Ph.D. The Digital Editor is Mike Muzurakis. The Editor is Pamela Chasek, Ph.D. <pam@iisd.org>. The Director of IISD Reporting Services is Langston James “Kimo” Goree VI <kimo@iisd.org>. The Sustaining Donors of the *Bulletin* are the European Union, the Government of Switzerland (the Swiss Federal Office for the Environment (FOEN)), the Italian Ministry for the Environment, Land and Sea, and the Kingdom of Saudi Arabia. General Support for the *Bulletin* during 2016 is provided by the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB), the New Zealand Ministry of Foreign Affairs and Trade, SWAN International, the Finnish Ministry for Foreign Affairs, the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES), the United Nations Environment Programme (UNEP), and the International Development Research Centre (IDRC). Specific funding for coverage of this meeting has been provided by the Prince Albert II of Monaco Foundation and the European Commission (EC). Funding for translation of the *Bulletin* into French has been provided by the Government of France, the Wallonia, Québec, and the International Organization of La Francophonie/Institute for Sustainable Development of La Francophonie (IOF/IFDD). The opinions expressed in the *Bulletin* are those of the authors and do not necessarily reflect the views of IISD or other donors. Excerpts from the *Bulletin* may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting services, contact the Director of IISD Reporting Services at <kimo@iisd.org>, +1-646-536-7556 or 300 East 56th St., 11D, New York, NY 10022 USA. The ENB team at the 2nd Session of the PrepCom can be contacted by e-mail at <elisa@iisd.org>.



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*in silico* in a definition of MGRs, as well as derivatives, and addressing the mobility of MGRs. Chair Charles requested delegates to continue discussion informally and report to plenary.

**PRINCIPLES AND APPROACHES:** The G-77/CHINA pointed to the common heritage principle as the legal foundation for benefit-sharing under the ILBI, highlighting the potential for scientific development, health and global welfare. JAMAICA noted that the common heritage principle encompasses: peaceful use, non-appropriation, future generations, and equitable benefit-sharing. ARGENTINA stressed the need to further explore benefit-sharing modalities. The Maldives for the Alliance of Small Island States (AOSIS) underscored the special needs of Small Island Developing States (SIDS) and the need for: capacity building; sharing benefits from MSR; and equitable and just mechanisms for monetary and non-monetary benefit-sharing. The AFRICAN GROUP noted that common heritage and freedom of the high seas are not mutually exclusive, with CARICOM recalling that high seas freedoms are not absolute. Nauru for the PACIFIC SIDS (PSIDS) highlighted: common heritage of mankind; the development of a trust fund for developing countries, with particular consideration of SIDS; capacity building for SIDS; and benefit-sharing with indigenous peoples from the utilization of traditional knowledge, drawing from the Nagoya Protocol. The FSM, supported by IRAN and KENYA, proposed language from UNCLOS on the use of MGRs in ABNJ being reserved for peaceful purposes. Focusing on land-locked countries, NEPAL stressed that freedoms of high seas and transit are interdependent.

The EU, supported by the US and IRAN, favored a pragmatic approach. CANADA proposed discussing the benefits associated with the common heritage principle. Noting that MGRs occur in the water column and in the Area, AUSTRALIA, supported by NORWAY, favored a pragmatic approach under which reference could still be made to the principles of common heritage and high seas freedoms without exclusively applying any of these regimes to MGRs. NORWAY also highlighted the list of benefits under the Nagoya Protocol and suggested providing a menu of potential benefits under the ILBI.

Underscoring capacity building and technology transfer, JAPAN reiterated that MGRs cannot be recognized as common heritage of mankind and that UNCLOS includes language on benefit-sharing only for mineral resources. IUCN underscored the common concern of humankind principle, stressing the need for publicly available information and data, legal certainty, capacity building, technology transfer, and greater transparency. NORWAY supported including a duty to use environmentally sound bioprospecting operations. VENEZUELA highlighted the 2030 Sustainable Development Agenda, the Stockholm Convention on Persistent Organic Pollutants, the London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, and the CBD, as well as the importance of international cooperation. ICELAND called for functional principles, which could be used in the future and encompass new technologies. The Intergovernmental Oceanographic Commission of the UN Educational, Scientific and Cultural Organization (IOC-UNESCO) drew attention to the dissemination of information arising from MSR as a non-monetary benefit, calling for MSR to be considered a cross-cutting element within the ILBI.

**ACCESS:** FIJI considered accessing MGRs as a challenge for developing countries and urged narrowing the gap through a regime with monetary and non-monetary benefits. IRAN highlighted links between non-appropriation of MGRs, access and benefit-sharing. The US reiterated that, under the high seas regime, anyone can freely access MGRs of ABNJ in accordance with international law.

COSTA RICA underscored that access should include *in situ*, *ex situ* and *in silico*. JAPAN cautioned against introducing restrictions to access to MGRs, as well as a monetary benefit-sharing mechanism, noting they could hinder research and development useful for humanity as a whole, including future generations. He stressed that *in silico* access is not included in the CBD and the Nagoya Protocol, cautioning against including it in the ILBI.

The G-77/CHINA noted that non-monetary benefits could be linked to capacity building, transfer of marine technology and the facilitation of MSR on MGRs; and called for a study of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and CBD provisions. The EU noted that: no international organization has the mandate to regulate access; access should be conducive to research; administrative burdens should be avoided; and due regard should be given to the interests of all states, the international community and future generations. ARGENTINA underscored the need for traceability and transparent mechanisms, pointing to Nagoya Protocol Article 17 on internationally recognized certificates.

**BENEFIT-SHARING:** The US expressed willingness to discuss potential non-monetary benefit-sharing options, in particular related to achieving conservation objectives, without creating operational inefficiencies and obstructing beneficial research and development activities. COSTA RICA underscored that: benefit-sharing should include monetary benefits upon commercialization, as well as non-monetary benefits; the ISA should be the administrative agency; and criteria for curating samples should include a clearing-house mechanism with access to genetic data and a protocol to ensure environmental protection.

VENEZUELA said that monetary benefits could derive from intellectual property rights (IPRs) or a tax regime, but noting difficulties related to applying IPRs to MGRs, he indicated that a flat tax could benefit all states. CARICOM suggested considering four existing models: UNCLOS provisions on MSR, CBD and Nagoya Protocol, ITPGR, and the Antarctic Treaty system. SINGAPORE called for genetic data sharing as a form of benefit-sharing.

The US did not support a benefit-sharing regime for MGRs in the water column. On a permit system for MGRs and regulation of MSR, AUSTRALIA recalled UNCLOS Articles 87 (freedom of MSR) and 239 (MSR promotion and facilitation). FSM underscored the need for prior consultations with indigenous peoples and local communities concerning their traditional knowledge, with the Nagoya Protocol providing a model.

### IN THE CORRIDORS

Spirits were high at the opening of the PrepCom 2: many delegates reminisced about the constructive dialogue that characterized PrepCom 1 and expressed hope that the current session would live up to the expectations raised in April. A veteran, however, noted that only a few had provided written submissions to the Chair, raising doubts as to whether national delegations had done their “summer homework” in order to engage in more concrete exchanges than at PrepCom 1.

As the opening plenary was swiftly wrapped up to allow the first informal working group to start its work in earnest, any doubts were quickly dispelled when a good number of delegations offered textual proposals for a definition of MGRs. Many participants were also pleasantly surprised by Chair Charles assigning “weekend homework” to delegations who were to craft more defined proposals in order for the PrepCom to progress even further and complete the task at hand. Those hopeful for an ILBI to be concluded sooner rather than later took this as a good omen.