

PREPCOM 4 HIGHLIGHTS: MONDAY, 17 JULY 2017

On Monday, 17 July, delegates met in plenary in the afternoon to consider a revised Chair's text containing draft recommendations to the UN General Assembly, including: a chapeau to the draft elements of a new international legally binding instrument (ILBI) on marine biodiversity beyond national jurisdiction (BBNJ); a procedural recommendation calling on the UN General Assembly to convene an intergovernmental conference (IGC) as soon as possible, with a possible starting date of 2018; and the draft elements of the ILBI.

After a round of general comments on the revised draft, delegates exchanges views on preambular elements of the ILBI and its general elements, including terms, scope of application, objectives and relationships with other instruments.

PLENARY

Chair Duarte invited comments on a revised Chair's draft, noting that not all suggested changes proposed during the first week had been included, in an effort to reflect those which had little or no opposition, or broad support. He proposed addressing the revised draft in plenary until Wednesday afternoon, followed by consideration of the PrepCom report, which will be introduced later in the week.

The G-77/CHINA stressed that the revised draft reflects the discussion in a fair manner and constitutes a balanced basis to continue deliberations. The AFRICAN GROUP, AOSIS, LDCs and the EU noted that the revised draft is an improvement and offers a good basis to fulfil the PrepCom's mandate. The AFRICAN GROUP welcomed: with the EU, the addition of preambular language stating that "the elements are without prejudice to the position of states during the negotiations"; as well as the streamlining of the text to avoid repetition. Noting that the revised draft takes into consideration concerns and improvements provided by delegations, the EU urged, with AOSIS and LDCs, for the preparatory phase of the process to be concluded and for recommendations leading to an IGC in 2018 to be adopted.

CARICOM supported the revised draft, welcoming language clarifying that the elements are "non-exclusive" and without prejudice to states' positions, and highlighted that the recommendation on convening an IGC does not prejudice the General Assembly's decision. PSIDS noted that the document takes

on board critical elements to strengthen the draft recommendations. FIJI and NEW ZEALAND expressed support for the revised draft recommendations observing that a fair balance had been struck. CANADA expressed satisfaction with the inclusion of broad suggestions relating to the chapeau.

The G-77/CHINA reiterated that the common heritage principle should be mentioned in the new ILBI as it is enshrined in UNCLOS, calling on the Chair to "find a way to accommodate" it, with ARGENTINA arguing that the section on the ILBI relationship with existing instruments "weakens" the draft, as the ILBI is expected to address the fragmentation of the current system. COSTA RICA indicated preference for stronger language in the draft, especially in the chapeau.

HONDURAS, INDONESIA, the DOMINICAN REPUBLIC, the PHILIPPINES, THAILAND, SENEGAL, COLOMBIA and MALAYSIA called for a recommendation to convene an IGC in 2018. CHILE preferred that the IGC take place in early 2018. The FSM noted that traditional knowledge could have been emphasized more and, with COSTA RICA, looked forward to the IGC. CHINA, with the RUSSIAN FEDERATION, noted that, according to Resolution 69/292, it is the General Assembly who should decide on convening, and on the timing for, an IGC.

MEXICO, supported by PAKISTAN, lauded the Chair for including separate sections on principles and approaches and on the clearinghouse mechanism; preferred a stronger recommendation on convening an IGC; and welcomed the proposed time allotted to discuss the PrepCom report. VENEZUELA asked for reflecting the legal status, rights, obligations and responsibilities of UNCLOS non-parties. INDONESIA proposed including reference to "Our Ocean, Our Future – Call for Action," the UN Ocean Conference outcome document.

The US acknowledged that progress has been made on many complicated issues, called for finalizing the consensus-based elements, and sought clarification on the intended organization of work. NORWAY welcomed both editorial and substantive changes to the revised draft as contributing to establishing the necessary balance and to providing assurance to move on with deliberations. CHINA said the revised text is an improvement in terms of structure, content and language, and a good foundation for further work. JAPAN noted that several matters included in the revised text need further fine-tuning, such as the relationship between benefit-sharing under the ILBI and existing mechanisms. The REPUBLIC

OF KOREA underscored that any future rule on BBNJ conservation and sustainable use shall not contravene the provisions of other applicable conventions, in particular UNCLOS. ICELAND said that if issues on which no consensus has been reached are to be included, they should be captured in a separate section.

The RUSSIAN FEDERATION stressed that: the revised draft reflects the views of only one group of states and does not strike the appropriate balance; in accordance with Resolution 69/292, two categories of recommendations to the General Assembly may be included, those that have reached consensus and those that, despite all efforts to reach consensus, have not; and in its current form, the revised draft is not acceptable. Noting the need to do more work on the revised draft, Chair Duarte proposed exchanging ideas on the draft section-by-section.

PREAMBULAR ELEMENTS: Stating that its application does not impede marine scientific research (MSR) or bioprospecting, the AFRICAN GROUP, with LDCs and VENEZUELA, and opposed by the US and JAPAN, reiterated the need to include the common heritage principle. The US, supported by JAPAN, CANADA and ICELAND, proposed affirming UNCLOS Part XIII (MSR) and that the ILBI must be consistent with UNCLOS Article 236 (sovereign immunity). SINGAPORE agreed on mentioning sovereign immunity but without referencing specific UNCLOS Articles.

CARICOM reiterated the need for referring to inter-generational equity, but only if there is scope for consensus. PSIDS called for including both inter- and intra-generational equity. VENEZUELA called for language, which duly recognizes the legal status of UNCLOS non-parties. CHINA reiterated his proposal to include that “humankind has become an indivisible community with a shared future linked to BBNJ conservation and sustainable use” and that “the international community as a whole has a common interest in BBNJ.”

The EU, supported by ICELAND, CANADA, SINGAPORE, NORWAY and ARGENTINA, proposed emphasizing the central role of UNCLOS vis-à-vis the role of other existing, relevant legal instruments and frameworks. JAPAN suggested: with NORWAY, including reference to cooperation and coordination with other existing legal instruments; and, with COLOMBIA but opposed by ARGENTINA, adding reference to the “critical” role of other existing relevant legal instruments. SINGAPORE, supported by NORWAY, suggested referring to the “essential,” rather than “critical,” role of other existing relevant legal instruments. ARGENTINA called for clarification on language recognizing the need to enhance cooperation and coordination with regard to BBNJ conservation and sustainable use.

The RUSSIAN FEDERATION requested: with NORWAY, strengthening language on the central role of UNCLOS, by adding that it sets the legal framework within which all activities in the oceans and seas must be carried out; eliminating language recognizing the need for a comprehensive global regime to better address BBNJ conservation and sustainable use, noting that, although it contains language from Resolution 69/292, it is removed from its original context; supported by NORWAY but opposed by ARGENTINA, referencing the UN Fish Stocks Agreement on affirming that matters not regulated by UNCLOS or the ILBI continue to be governed by the rules and principles of general

international law; and indicating that BBNJ is not compatible with the common heritage principle, as the freedom of the high seas applies.

PERU proposed adding “having considered the feasibility of developing an ILBI” to language recognizing the need for the comprehensive global regime to better address BBNJ conservation and sustainable use. The PHILIPPINES called for recognizing the need for assistance also for states most ecologically vulnerable.

GENERAL ELEMENTS: Scope of application: The US, supported by JAPAN, preferred eliminating reference to UNCLOS Article 305 (signature), with ARGENTINA suggesting language to clarify that the ILBI will be open to UNCLOS non-parties and regional economic integration organizations (REIOs).

The US, with JAPAN but opposed by CARICOM and the FSM, called for eliminating the section on material scope. The EU stressed the need to adequately reflect coastal states’ rights over the continental shelf both within and, with the FSM, beyond 200 nautical miles. JAPAN proposed a specific reference to respect coastal states’ rights and jurisdiction over all areas under their national jurisdiction “including the continental shelf, including that beyond 200 nautical miles.”

Objectives: The EU, opposed by the AFRICAN GROUP and the FSM, favored deleting reference to “long-term” conservation and sustainable use, so as not to preclude short-term conservation measures. ARGENTINA proposed merely referring to the ILBI setting out additional objectives.

Relationship with other instruments: The EU, opposed by COLOMBIA, suggested deleting language on not affecting the legal status of non-parties to UNCLOS or other related agreements.

IN THE CORRIDORS

Re-energized after a two-and-a-half-day break in sunny New York, most PrepCom delegates welcomed the Chair’s revised draft as “balanced” and “fair.” “Not all the elements are incorporated, though, as this is part of the negotiations—we understand that we won’t all be happy, but we are willing to accept this,” summed up one negotiator.

Some participants, however, were worried about the lone delegation that considered the draft unacceptable and a few others that hinted at the need for extensive nips and tucks. “It seems that the Chair’s elegant attempt to differentiate where the draft uses “would” (representing consensus elements) as opposed to “could” (representing elements that require further discussion) was not as convincing as expected,” sighed a participant, pointing to some candid statements from outliers about the need to insert a separate section in the recommendations on elements on which consensus will not be achieved.

One legally minded delegate argued that the basis for such a separate list in the PrepCom’s mandate is open to interpretation, as Resolution 69/292 “recognizes that any elements where consensus is not attained, even after exhausting every effort, may also be included in a section of the PrepCom recommendations to the General Assembly.” As delegates braced themselves for potential late-night deliberations, many expected the question of whether “efforts towards consensus have been exhausted” to be a difficult one to reach agreement on.