

## BBNJ IGC-2 Highlights: Tuesday, 26 March 2019

The second Intergovernmental Conference (IGC-2) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) resumed on Tuesday, March 26, 2019. Delegates continued to discuss benefit-sharing related to marine genetic resources (MGRs) in an informal working group facilitated by Janine Coye-Felson (Belize), based on the President's Aid to Negotiations.

### Informal Working Group on MGRs

**Benefit-Sharing and Related Modalities:** On *objectives*, NORWAY said that whether or not a specific section on objectives regarding MGRs is required should be decided at a later stage. HOLY SEE, with ICELAND, agreed in principle with a "no text option" where principles would be stated in general provisions; with HOLY SEE proposing to include benefit-sharing objectives in a separate provision.

VIET NAM and IRAN expressed flexibility on including a general section on objectives for the entire agreement. CHINA suggested not considering specific MGR-related objectives at this stage, preferring a single provision on objectives. AUSTRALIA suggested streamlining and consolidating sections on objectives and principles.

CUBA supported the objectives listed, but called for clarifying the term "sustainable use." PAPUA NEW GUINEA (PNG), supported by the FEDERATED STATES OF MICRONESIA (FSM), proposed "fair" and equitable benefit sharing to align with the Nagoya Protocol.

SINGAPORE, supported by VIET NAM, INDONESIA, ERITREA, CARICOM, THAILAND, PNG, and the PHILIPPINES preferred the statement of objectives, noting that the formulations could be further refined. MAURITIUS and NEPAL recommended specifically considering the needs of small island developing states (SIDS) and landlocked developing countries (LLDCs).

On *principles and approaches*, CHINA, with CUBA, suggested a single provision dealing with principles for the whole agreement. AUSTRALIA said that not all principles mentioned are directly applicable to MGRs.

NORWAY, HOLY SEE, and ICELAND supported the "no text" option, with NORWAY suggesting focusing instead on deliverables. HOLY SEE proposed a synthesis of existing language considering "due regard" in general provisions to address common heritage of humankind (CHM) and high seas freedoms. ICELAND suggested that CHM and high seas freedoms could be discussed in a separate forum.

VIET NAM, the PHILIPPINES, THAILAND, NEPAL, COLOMBIA, MALDIVES, and IRAN supported CHM. The RUSSIAN FEDERATION argued that the IGC does not have the

mandate to consider CHM. INDONESIA suggested focusing on creating a *sui generis* system for the responsible use of MGRs, rather than on the dichotomy between CHM and high seas freedoms.

FSM stressed that the extended continental shelf is not in ABNJ and that gaps regarding claims to the Commission on the Limits of the Continental Shelf (CLCS) should be addressed, as should the effect of sea-level rise on baseline jurisdiction-related determinations.

NAURU underlined the importance of indigenous and traditional knowledge-holders in benefit-sharing, supported by the INTERNATIONAL COUNCIL ON ENVIRONMENTAL LAW, and suggested an open system of equitable access to non-commercial MGR benefits. SAMOA highlighted the importance of adjacency and MALDIVES highlighted the special case of SIDS.

On *benefits*, NORWAY, ICELAND, and NEW ZEALAND supported sharing non-monetary benefits, with CHINA saying that these could include capacity building and technology transfer (CB&TT) and access to samples. NEW ZEALAND cautioned against disincentivizing scientific research with a focus on monetary benefit-sharing. The G-77/CHINA stressed that benefits should not only be non-monetary.

SINGAPORE, with VIET NAM, INDONESIA, IRAN, THAILAND, ERITREA, MALDIVES, and the PHILIPPINES supported sharing both monetary and non-monetary benefits, contained in a non-exhaustive list. AUSTRALIA favored a focus on non-monetary benefits.

The RUSSIAN FEDERATION argued that there is no legal justification for considering monetary benefit-sharing.

Exhorting that "exploration should not be conflated with exploitation," HOLY SEE stressed that the ILBI should differentiate between potential and actual value of MGRs; that monetary benefit-sharing should be constrained to commercial use; and that their calculation should be tied to profits from commercial transactions. With CANADA, she called for clarifying "non-monetary benefits" as well as "users" of MGRs.

Supporting the EU's proposed holistic approach, PNG said that benefit-sharing should be triggered at the point of access, and that traceability and disclosure of origin should be included in any holistic approach. The FSM underscored the special case of SIDS, emphasizing that some countries are more vulnerable to the misuse of marine resources. COLOMBIA requested a robust way to monitor origin of samples, disseminate scientific information, and prevent biopiracy.

DEEP-OCEAN STEWARDSHIP INITIATIVE stated that facilitating access to MGRs is a benefit, and benefit-sharing is linked to marine scientific research (MSR) and CB&TT. IUCN highlighted MSR cruises as capacity building initiatives as they include developing country researchers. The INTERNATIONAL COUNCIL

ON ENVIRONMENTAL LAW noted that monetary benefits could include subscription and royalty payments, as well as a certification scheme, to encourage voluntary benefit-sharing.

On **benefit-sharing modalities**, NORWAY favored a pragmatic, functional, cost-effective regime for benefit-sharing that promotes innovation; and supported a system of mandatory notification regarding bioprospecting cruises in areas beyond national jurisdiction (ABNJ), coupled with a duty to share information in publicly available repositories.

CHINA reiterated that modalities will differ for monetary and non-monetary benefit-sharing. CANADA called for clarity on the different benefit-sharing stages. ICELAND supported merging the requirement for scientists and states to share non-monetary benefits. The G-77/CHINA said that voluntary benefit-sharing alone would be insufficient.

VIET NAM, IRAN, MADRIVES, CUBA and the PHILIPPINES called for all benefits to be shared on a non-voluntary basis. IRAN emphasized that limiting benefit-sharing to a voluntary, non-monetary dimension will diminish the efficiency of the ILBI. SINGAPORE expressed concern about sharing benefits with non-state parties.

Supporting a benefit-sharing trust fund, ERITREA queried the arbitrary nature of the base 1% payment level of net revenue originating from the commercial use of MGR, and supported the HOLY SEE's assertion that net revenue does not necessarily equate profit.

On the **clearinghouse mechanism**, many supported text related to the clearinghouse. The EU observed that the clearinghouse should serve as tool to disseminate data and information, especially on technology transfer, but noted that it would be difficult for it to promote transparency. He noted that the clearinghouse could function as "meta-repository" for collecting information and that pre-cruise information and post-cruise notification could be transmitted to the clearinghouse. CARICOM, P-SIDS, and the AFRICAN GROUP supported a "without prejudice" listing of clearinghouse functions.

CANADA requested streamlining the text. The US, with NORWAY, supported that the clearinghouse promote transparency in MGR use, disseminate data and scientific information as well as CB&TT, and improve cooperation and coordination. The US, SWITZERLAND, and SINGAPORE did not support the adoption of a code of conduct.

The REPUBLIC OF KOREA and the RUSSIAN FEDERATION rejected a clearinghouse mechanism in the instrument.

On **IPRs**, CARICOM and P-SIDS supported a *sui generis* approach. The G-77/CHINA, the AFRICAN GROUP, IRAN, TONGA, FSM, TURKEY, PNG, SRI LANKA, and CUBA supported including IPRs in this section. CHINA and SINGAPORE supported addressing IPR under existing mechanisms, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

The AFRICAN GROUP highlighted the lack of an appropriate forum for discussing the monetary aspects of benefit-sharing, given that the relationship between BBNJ, WIPO, and the WTO is unclear in terms of an IPR mechanism.

The EU, CANADA, the US, SWITZERLAND, NORWAY, HOLY SEE, JAPAN, the REPUBLIC OF KOREA, the RUSSIAN FEDERATION, and AUSTRALIA did not support addressing IPRs in the ILBI.

FSM suggested including a provision to prevent parties from undermining the traceability and benefit-sharing of MGRs. FIJI proposed that the disclosure of origin of MGRs be considered a non-monetary benefit.

On **monitoring**, CARICOM noted that no single institution could address issues related to monitoring, noting the need for cooperation between relevant existing institutions. G-77/CHINA, the AFRICAN GROUP, and the LIKE-MINDED LATIN AMERICAN

COUNTRIES supported the option containing monitoring measures. P-SIDS noted that disclosure of origin for patent applications should be required, emphasizing the need for stringent traceability mechanisms. TONGA recommended an institutional mechanism to determine "appropriate policy measures, conduct, and guidelines" for the use of benefits in ABNJ.

The EU preferred the "no text" option, along with the RUSSIAN FEDERATION, AUSTRALIA, and the REPUBLIC OF KOREA. CANADA and CHINA expressed concerns that the current language would create burdensome institutions.

**Scope:** The G-77/CHINA preferred an option on MGR activities being conducted with due regard to rights of coastal states under the jurisdiction of which resources are found.

On **geographical scope**, CARICOM preferred the option applicable to MGRs and interpretation consistent with UNCLOS. P-SIDS supported this option with the caveat that it be without prejudice to the application of *ex situ* and *in silico* access. BANGLADESH recommended a strong legal definition of the Area. The EU favored merging text related to the geographic, material, and temporal scope.

TURKEY supported including the high seas and the Area. The RUSSIAN FEDERATION supported the scope applying to MGRs in ABNJ.

The REPUBLIC OF KOREA did not support text on the geographical scope of MGRs.

On **material scope**, CARICOM and P-SIDS supported including fish and other biological resources for research into their genetic properties; MGRs collected *in situ*, accessed *ex situ* and *in silico*; and digital sequence data and derivatives. P-SIDS called for clarity on digital sequence data. TURKEY supported the application to MGRs collected *in situ* including digital sequencing data.

The REPUBLIC OF KOREA, TURKEY, the EU, MOROCCO, and the RUSSIAN FEDERATION underscored that the ILBI should not apply to fish and other biological resources as commodities.

On the **temporal scope**, MOROCCO preferred the "no text" option.

**Access:** CARICOM preferred a *sui generis* approach to access and benefit-sharing (ABS), and a non-intrusive track and trace regime. P-SIDS supported the same approach, but proposed including the "fair and equitable" sharing of benefits. The REPUBLIC OF KOREA preferred a "no text" option concerning access.

The LIKE-MINDED LATIN AMERICAN COUNTRIES noted that provisions on access should apply to all activities, requesting clarification on the conditions to promote and encourage MSR, in particular in cases of change of intent.

The EU also asked for clarification on the access mechanism associated with traditional knowledge.

### **In the Corridors**

As discussions on MGRs heated up on Tuesday, some observers were happy to hear more concrete options emerge. "These are the kind of discussions that will ultimately shape the treaty," one opined after particularly intense talks on benefit-sharing modalities and the treatment of IPRs. As delegates teased apart, or skirted around, the President's Aid on IPRs, some delegations voiced their frustrations on the correct forum to discuss these rights. "When we go to WIPO, we are referred to the WTO," they complained, "and when we try to discuss it at BBNJ, we are referred to WIPO." They lamented that, in this merry-go-round of intellectual property fora, "we may never get the answers we are seeking."

As delegates finalized their deliberations for the day, many acknowledged the complexity and intricacies of the BBNJ process, but remained convinced that a strong treaty is in the best interest of all states. "Implementing better ways of sharing and managing information and science is the goal," one observer pressed. "That's the low-hanging fruit."