

# CIL NUS Workshop: Preparing for the BBNJ PrepCom

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2<sup>nd</sup> MOFA Japan LOS Symposium

Wednesday 17 February 2016



# Preview

- UNGA Resolution A/RES/69/292
- PrepCom: Issues and Limitations
- CIL Workshop
- Questions to be Answered

## A/RES/69/292, 19 June 2015

- Decided to develop an internationally legally binding instrument **under the LOS Convention**
- on the conservation and sustainable use of
- marine biological diversity of
- areas beyond national jurisdiction
- **Preparatory Committee** to meet 28 March-8 April 2016, 26 August-9 September 2016, and twice in 2017
- To make substantive recommendations of **elements** of draft text of the instrument
- UNGA to decide before end of 72<sup>nd</sup> session (2018) on convening of and starting date of DipCom



# PrepCom

- Chaired by Amb Eden Charles of T&T
- To exhaust every effort to reach agreement on substantive matters by consensus
- Those elements not attaining consensus to be reported in PrepCom's report to the UNGA
- Consensus = adoption of a decision without voting and without the expression of any stated objection



# Issues for PrepCom

- Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ)
- In particular, together and as a whole [i.e. the 2011 package deal]
- Marine genetic resources (MGR), including
- Sharing of benefits (i.e. asset and benefit sharing)
- Area-based management tools, including marine protected areas (MPAs)
- Environmental impact assessments (EIAs)
- Capacity-building and transfer of marine technology





# Limitations

- Not undermine existing relevant legal instruments and frameworks, and
- Relevant global, regional and sectoral bodies
- Non-parties may participate



# CIL Workshop

- Singapore 3-4 February 2016
- Over 100 participants from all interested governments, IOs, and NGOs
- Ambassadors Eden Charles and Tommy Koh active participants
- Chatham House Rule applied to discussions
- Report of Workshop, full program and reading materials at <http://cil.nus.edu.sg/programmes-and-activities/past-events/conservation-and-sustainable-use-of-marine-biological-diversity-of-areas-beyond-national-jurisdiction-preparing-for-the-prepcom/>
- Executive Summary to be uploaded, with full Report to follow



# Conclusions of Workshop - 1

- Session on Conservation and Sustainable Use of BBNJ
- There are many excellent regional and sectoral tools, but there needs to be coordination
- Not only technical coordination by secretariats but also policy coordination within and driven by member states
- We have to be careful not to undermine the existing regional and sectoral bodies
- Sectoral regional bodies need to consider cumulative impacts: this is particularly difficult





## Conclusions of Workshop - 2

- Session on Management Tools and Institutional Arrangements
- A lot of work has been done by sectoral and regional bodies. Precautionary approach is important. Challenges: not all regions are covered by the current bodies.
- Under the new agreement, different sectoral and regional should be brought together to better protect and preserve the marine environment.
- There is a need for better coordination and cooperation and a new agreement could be useful in this regard.
- No conclusion on institutional arrangement but should not be overly burdensome, should utilize the potential synergies with respect to existing institutions.



## Conclusions of Workshop - 3

- Session on marine genetic resources (MGRs)
  - Neither common heritage of mankind or freedom of navigation is realistic. There should be a search for a middle ground.
  - Outcome must reflect new knowledge.
  - Must have mechanism for asset and benefit sharing.
- Session on MGRs: Access and Benefit Sharing
  - Because there is such a wide variety of knowledge with regard to WIPO and WTO, each delegation is encouraged to reach out to its counterparts to ensure that they understand what is going and be at the same level.



## Conclusions of Workshop - 4

- Session on Capacity-building and Transfer of Technology
- BBNJ is a trans-sectoral topic
- Scope of capacity and transfer of technology has broader scope than in the resolution
- The need and how to vitalize or revitalize Part XIV of UNCLOS
- The need to articulate between capacity building and new ways of transfer of marine technology
- Need an element about capacity building and financial arrangements



## Conclusions of Workshop - 5

- Session on Mandate and Work Programme of PrepCom
- PrepCom is a PrepCom and nothing more than PrepCom
- The role of PrepCom is to agree on elements, not the actual text.
- The only way forward is consensus
- Two years are an opportunity to reach as much consensus as possible



# Fundamental Questions - 1

- To be answered at negotiations of PrepCom or DipCon include:
- What is “marine biological diversity”, including its subject matter and geographic scope?
  - Should the CBD definition be relied on?
  - All living organisms in the whole of the high seas and on the Area?
  - Only those living organisms on the seabed of the Area?
  - Only the living organisms in the water column near specific seabed formations that support endemic and unique communities such as hydrothermal vents and cold seeps?
  - Both of the latter two, to exclude other living organisms higher in the water column?
  - What are “marine genetic resources”? Included or excluded from “marine biological diversity”?
  - Marine genetic resources of what living organisms?



## Fundamental Questions - 2

- What, if anything beyond the mineral resources of the Area, be included as common heritage of mankind?
  - Living organisms on and in the seabed of the Area, or just their MGR?
  - Living organisms in the water column that remain in contact with the seabed and subsoil beyond the limits of national jurisdiction?
- “Area” is defined in UNCLOS Article 1(1)(1) as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”
- Article 146: “The Area and its resources are the common heritage of mankind”
- Article 133(a) defines “resources” as “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules”
- Resources, when recovered from the Area, are referred to as “minerals” (Article 133(b))
- Sedentary species of the continental shelf are “organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant contact with the seabed or the subsoil” (article 77(4))



## Fundamental Questions - 3

- Is a new institutional mechanism needed to improve the fragmentation of existing ocean governance regime? If yes, which and how?
- Should bioprospection be defined and distinguished from basic MSR?
  - If yes, what would be the criteria?
  - Is the key component the characterisation of possible commercial intent, or is it the realisation of financial gain?

# Fundamental Questions - 4

- What assets and benefits should be shared?
  - Monetary? Of royalties, revenues, profits, etc?
  - Non-monetary? What kinds?
  - How should the monetary and non-monetary benefits be shared? In the same or different ways?
- Could publication of the results of MSR constitute non-monetary benefits?
- Could lists of open-source access genes be developed as non-monetary benefits?



## Fundamental Questions - 5

- How should intellectual property rights on MGRs be regulated?
  - In the BBNJ implementing agreement?
  - In the WIPO IGC work?
  - By incorporation by reference of WIPO IGC work in the BBNJ agreement?
  - Through amendment to the TRIPS Agreement?
  - Can the patentability of naturally occurring MGRs be effectively limited?



## Fundamental Questions - 6

- Should there be separate area-based management tools for the seabed of the Area and the water column (high seas), or should they be homogenised?
- What should be the threshold for requiring EIAs?
  - UNCLOS Article 206?
  - Some other threshold?
- What should be the applicable standards for baseline constitution and scoping of impact assessment, including cumulative impact?





## Fundamental Questions - 7

- Capacity building and transfer of marine technology of what subjects?
  - What financial means?
  - How can UNCLOS Part XIV on TMT be better operationalized?

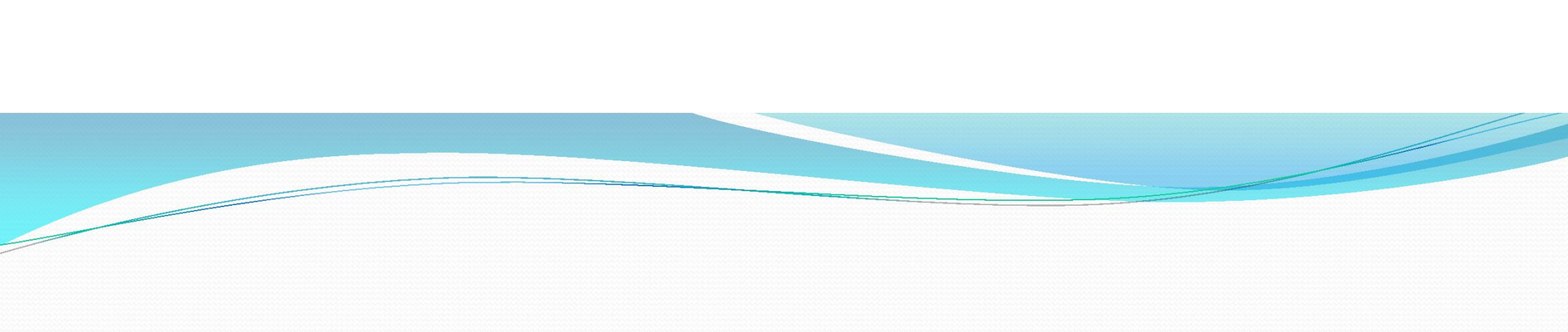
# Fundamental Questions - 8

- For the PrepCom:
- What is and is not an “element”?
  - Draft working of texts?
  - Answers to forgoing questions?
- What is meant by “consensus”?
  - Former UN Legal Counsel Hans Correll gave an opinion decades ago that not all delegations agreed with
  - IATTC Antigua Convention defines “consensus” as “the adoption of a decision without voting and without the expression of any stated objection”
  - Correll had ruled that more had to be done than merely state an objection to break consensus
- No voting at the PrepCom?



## Fundamental Questions - 9

- Where should elements not achieving consensus go in the report of the PrepCom?
  - In a section of the recommendations of the PrepCom to the General Assembly?
  - In an annex to the report?

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- Will there be a DipCom?
  - Resolution A/69/292 is ambiguous
    - Para 1(k): “will decide” on convening and starting date
    - Para 1 “decides” to develop legally binding instrument
    - Para 1(a): “decides” to establish, prior to holding DipCon, a PrepCom

## Fundamental Questions - 10

- What form should a BBNJ implementing agreement take?
- How to ensure new legally binding instrument is “under the Convention” as required by para. 1(a) of the resolution?
  - Treaty linked to UNCLOS, or something else?
  - Modelled on 1995 Fish Stocks agreement (Preamble, Parts I and Parts VIII-XIII)?
- What to adapt from the 1994 Part XI Implementing Agreement?