



NINTH MEETING OF THE WORKING GROUP ON MARINE BIODIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION: 20-23 JANUARY 2015

The ninth meeting of the *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (hereafter, the Working Group) opens today and will continue until 23 January 2015 at the UN Headquarters in New York. The meeting is the last of three meetings (April 2014, June 2014 and January 2015) convened by the UN General Assembly through its resolution 68/70 to discuss the scope, parameters and feasibility of a possible new international instrument on marine biodiversity in areas beyond national jurisdiction (BBNJ) under the UN Convention on the Law of the Sea (UNCLOS). The meeting is expected to produce recommendations for a decision to be taken at the sixty-ninth session of the UN General Assembly on the development of a new international instrument on BBNJ under UNCLOS, as mandated by the 2012 UN Conference on Sustainable Development (Rio+20).

A BRIEF HISTORY OF MARINE BIODIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION

The conservation and sustainable use of BBNJ is increasingly attracting international attention, as scientific information, albeit insufficient, reveals the richness and vulnerability of such biodiversity, particularly in seamounts, hydrothermal vents and cold-water coral reefs, while concerns grow about the increasing anthropogenic pressure posed by existing and emerging activities, such as fishing and bioprospecting, in the deep sea.

UNCLOS, which entered into force on 16 November 1994, sets forth the rights and obligations of states regarding the use of the oceans, their resources, and the protection of the marine and coastal environment. Although UNCLOS does not refer expressly to marine biodiversity, it is commonly regarded as establishing the legal framework for all activities in the oceans. The Convention on Biological Diversity (CBD), which entered into force on 29 December 1993, defines biodiversity and aims to promote its conservation, the sustainable use of its components, and the fair and equitable sharing of the benefits

arising from the use of genetic resources. In areas beyond national jurisdiction (ABNJ), the Convention applies to processes and activities carried out under the jurisdiction or control of its parties. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which entered into force on 12 October 2014, applies to genetic resources within the scope of CBD Article 15 (Access to Genetic Resources) and to traditional knowledge associated with genetic resources within the scope of the Convention.

In resolution 59/24 of 2004, the General Assembly established an *ad hoc* open-ended informal working group to study issues relating to the conservation and sustainable use of BBNJ, and called upon states and international organizations to take action urgently to address, in accordance with international law, destructive practices that have adverse impacts on marine biodiversity and ecosystems.

FIRST MEETING OF THE WORKING GROUP: The first meeting of the Working Group (13-17 February 2006, New York) exchanged views on institutional coordination, the need for short-term measures to address illegal, unregulated and unreported (IUU) fishing and destructive fishing practices, marine genetic resources (MGRs), avoiding the adverse impacts of marine scientific research (MSR) on marine biodiversity, and facilitating the establishment of high seas marine protected areas (MPAs). A Co-Chairs' summary of trends and a report of the discussions on issues, questions and ideas related to the conservation and sustainable use of BBNJ was transmitted to the General Assembly as an addendum to the report of the Secretary-General on oceans and the law of the sea.

SECOND MEETING OF THE WORKING GROUP: The second meeting of the Working Group (28 April - 2 May 2008, New York) produced a Co-Chairs' Draft Joint Statement identifying issues for the General Assembly to consider referring back to the Working Group, including: more effective implementation and enforcement of existing agreements; strengthening of cooperation and coordination; development of an effective environmental impact assessment (EIA) tool for oceans management; development of area-based management tools; practical measures to address the conservation and sustainable use of MGRs; and continued and enhanced MSR.

THIRD MEETING OF THE WORKING GROUP: The third meeting of the Working Group (1-5 February 2010, New York) agreed, by consensus, to a package of recommendations

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to the General Assembly on, *inter alia*: including in the Secretary-General's report on oceans and the law of the sea information on EIAs undertaken for planned activities in ABNJ; recognizing the importance of further developing scientific and technical guidance on the implementation of EIAs on planned activities in ABNJ, including consideration of assessments of cumulative impacts; calling upon states to work through competent international organizations towards the development of a common methodology for the identification and selection of marine areas that may benefit from protection based on existing criteria; calling upon states, in the context of the Working Group's mandate, to make progress in the discussions on MGRs in ABNJ; and reconvening the Working Group in 2011, to provide further recommendations to the General Assembly.

FOURTH MEETING OF THE WORKING GROUP: The fourth meeting of the Working Group (31 May - 3 June 2011, New York) adopted, by consensus, a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of BBNJ, by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS. The recommendations also include a "package" of issues to be addressed as a whole in this process, namely: MGRs, including questions on benefit-sharing; measures such as EIAs and area-based management tools, including MPAs; and capacity building and the transfer of marine technology.

FIFTH MEETING OF THE WORKING GROUP: The fifth meeting of the Working Group (7-11 May 2012, New York) engaged in substantive debates on the gaps and ways forward in plenary and intense negotiations, mostly in a government-only informal setting, on whether to recommend the launch of formal negotiations on a new implementing agreement to UNCLOS. The Working Group eventually recommended by consensus that the General Assembly task it to continue to consider all issues under its mandate as a package with a view to making progress on ways forward to fulfill its mandate. The Working Group also adopted terms of reference for two intersessional workshops to improve understanding of the issues before it and thus lead to a more informed and productive debate at its next meeting.

UN CONFERENCE ON SUSTAINABLE DEVELOPMENT (RIO+20): The UN Conference on Sustainable Development (20-22 June 2012, Rio de Janeiro, Brazil) expressed a commitment for States to address, on an urgent basis, building on the work of the Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of BBNJ, including by taking a decision on the development of an international instrument under UNCLOS.

SIXTH MEETING OF THE WORKING GROUP: The sixth meeting of the Working Group (19-23 August 2013, New York) resulted in a consensus recommendation on establishing a preparatory process within the Working Group to fulfill the Rio+20 commitment by focusing on the scope, parameters and feasibility of an international instrument under UNCLOS, calling upon the Working Group to be convened twice in 2014 and at least once in 2015, with a view to preparing for a decision on BBNJ by the General Assembly before the end of its sixty-ninth session.

SEVENTH MEETING OF THE WORKING GROUP: The seventh meeting of the Working Group (1-4 April 2014, New York) engaged in an interactive substantive debate on the

scope, parameters and feasibility of an international instrument under UNCLOS, focusing on: the overall objective and starting point; the legal framework for an international instrument; the relationship to other instruments; guiding approaches; guiding principles; each of the elements of the "package;" and enabling elements and means of implementation.

EIGHTH MEETING OF THE WORKING GROUP: The eighth meeting of the Working Group (16-19 June 2014, New York) engaged in a more detailed substantive discussion on the scope, parameters and feasibility of an international instrument under UNCLOS, and called upon the Co-Chairs to prepare draft elements of a recommendation to the General Assembly, based on the "package," also outlining the main elements of convergence emerged in the Working Group, for consideration at the next meeting.

INTERSESSIONAL HIGHLIGHTS

CBD COP 12: The twelfth meeting of the CBD Conference of the Parties (CBD COP 12, 6-17 October 2014, Pyeongchang, Republic of Korea) encouraged governments to make use of the scientific information, as well as information from indigenous and local communities, regarding the description of areas meeting the criteria for ecologically or biologically significant marine areas (EBSAs), including the information in the EBSA repository and information-sharing mechanism, when carrying out marine spatial planning, development of representative MPA networks, and application of other area-based management measures in marine and coastal areas. The COP also invited governments "who find it appropriate to do so, individually, in accordance with national legislation, bilaterally or jointly at the regional level, and, where appropriate, in collaboration with competent intergovernmental organizations, in accordance with international law, including UNCLOS, to undertake scientific and technical analysis of the status of marine and coastal biodiversity in areas within governments' respective jurisdictions and intergovernmental organizations' mandates, described as meeting the EBSA criteria and contained in the EBSA repository."

NAGOYA COP/MOP 1: The first meeting of the COP serving as the meeting of the Parties (MOP) to the Nagoya Protocol (13-17 October 2014, Pyeongchang, Republic of Korea) invited further work, including commissioning a study, on Article 10 of the Protocol, which calls upon parties to consider the need for and modalities of a global multilateral benefit-sharing mechanism for the utilization of genetic resources and traditional knowledge that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent, with a view to supporting the conservation of biodiversity and the sustainable use of its components globally.

UNGA 68: In resolution 69/245 on oceans and the law of the sea, the General Assembly reaffirmed the Rio+20 commitment on BBNJ; recalled its decision that, to meet the Rio+20 commitment, the Working Group meet for three meetings of four days each, with the possibility of the General Assembly deciding that additional meetings would be held, if needed, within existing resources; and reaffirmed its request to make recommendations to the General Assembly at the January 2015 meeting of the Working Group on the scope, parameters and feasibility of an international instrument under UNCLOS.



MARINE BIODIVERSITY WORKING GROUP HIGHLIGHTS: TUESDAY, 20 JANUARY 2015

The ninth meeting of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ opened on Tuesday, 20 January 2015, at the UN Headquarters in New York. Delegates heard opening statements, addressed organizational matters and delivered general statements. In the afternoon, no delegation offered further views on the scope, parameters and feasibility of a new international instrument on BBNJ, so delegates started exchanging views on a Co-Chair's non-paper containing draft elements for recommendation to the General Assembly, which had been circulated to national delegations in December 2014.

OPENING

Co-Chair Liesbeth Lijnzaad (Netherlands) opened the meeting. Speaking on behalf of the UN Secretary-General, Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and UN Legal Counsel, noted that differences still remain in the deliberations on BBNJ, and called upon delegates to "crystallize ideas in areas of convergence" in order to meet the deadline to submit recommendations to the General Assembly.

Co-Chair Palitha Kohona (Sri Lanka) highlighted growing support for a new legally binding instrument on BBNJ under UNCLOS, noting that any such instrument should be holistic and take into account the needs of both developing and developed countries. Co-Chair Lijnzaad reported that a synthesis of the key ideas discussed in the two previous Working Group meetings had been circulated to national delegations in December 2014 as a Co-Chairs' non-paper containing draft elements of a recommendation to the General Assembly, as well as an updated compilation of state submissions.

Co-Chair Lijnzaad introduced, and delegates approved without amendment, the provisional agenda (A/AC.276/L.15) and the draft format, annotated provisional agenda and organization of work (A/AC.276/L.16).

GENERAL STATEMENTS

South Africa, for the G77/CHINA, emphasized: the legal gap concerning UNCLOS provisions on access and benefit-sharing (ABS) from MGRs; the common heritage of mankind as part of customary international law and guiding principle for a new implementing agreement; and the 2011 package, including benefit-sharing taking into account IPRs, MSR, capacity building and technology transfer. Morocco, on behalf of the

AFRICAN GROUP, argued that the adoption of a legally binding agreement under UNCLOS is the only way to resolve issues of exploitation of BBNJ. Trinidad and Tobago, on behalf of the CARIBBEAN COMMUNITY (CARICOM), stressed the need for a new implementing agreement under UNCLOS that builds upon the common heritage principle and strengthens UNCLOS by addressing gaps on the conservation and use of MGRs in ABNJ. Underlining that the time for action is now, Maldives for the ALLIANCE OF SMALL ISLAND DEVELOPING STATES (AOSIS) called for launching negotiations on a new implementing agreement as soon as possible.

Italy for the EUROPEAN UNION (EU) urged an intergovernmental conference be convened as soon as possible and, supported by SINGAPORE, said it should complete work within an agreed deadline. MOROCCO called for convening an intergovernmental conference to draft a legally binding instrument on BBNJ, stressing that the 2011 package has already been agreed by the General Assembly and should not be re-opened. JAMAICA said that there is sufficient momentum for the Working Group to recommend that the General Assembly mandate formal negotiations towards an international agreement building upon UNCLOS, the ecosystem approach and the common heritage of mankind.

MEXICO noted growing consensus in different regions on the need for a new legally binding instrument to complement UNCLOS and international customary law; and called for a pragmatic approach to formal negotiations based on the framework of the existing legal regime, cost-efficiency, and the promotion of economic incentives. COSTA RICA suggested that recommendations to the General Assembly should be general in calling for an intergovernmental conference, accompanied by a preparatory process, on the basis of the 2011 package. VENEZUELA called attention to states that are not party to UNCLOS, noting a new instrument on BBNJ could be developed under the CBD. PERU suggested ensuring that a new agreement be open to all states.

AUSTRALIA suggested making clear and concrete consensus recommendations to the General Assembly providing succinct guidance on scope and parameters of a new implementing agreement, as well as on a possible process and timelines for inclusive and transparent negotiations, including a preparatory process for an intergovernmental conference. NEW ZEALAND argued that the increasing pressures and cumulative impacts on BBNJ, as well as the legal gaps in and fragmentation of the existing legal framework, prove the need for a new implementing agreement. SINGAPORE recommended postponing

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discussion of specific concepts to the formal negotiations of an implementing agreement. SRI LANKA emphasized the need to address IPRs, and opportunities for sharing the results of MSR.

ICELAND reiterated his position that a new international instrument should focus on legal gaps, such as MGRs, and cautioned against re-opening issues that are already subject to the existing international regime, such as fisheries. CANADA stated that she remains to be convinced that launching negotiations on a new instrument is the best way to urgently achieve actual results. She suggested that potential negotiations should be guided by: the need to preserve the balance of interests, and existing rights and obligations; the respect of regional and sectoral frameworks; targeted and realistic measures based on best available scientific knowledge; the avoidance of excessively bureaucratic processes for MSR; inclusion of intergovernmental, non-governmental and industry stakeholders; and a sufficient timeframe for fully debating options. JAPAN said that the conservation and sustainable use of BBNJ should not undermine existing international frameworks. The RUSSIAN FEDERATION expressed skepticism over the need for a new agreement, and favored excluding high-seas fishing and identifying legal gaps before negotiations begin. The US opined that a persuasive case for a new implementing agreement has yet to be made, arguing that the 2011 package is no more than a list of potential topics to be covered. The REPUBLIC OF KOREA remarked that consensus is yet to be achieved on several issues, including on how to ensure compatibility with existing instruments and bodies without affecting their mandate. Arguing that resolving all issues falls outside the Working Group's mandate, GUATEMALA stated that launching negotiations on a new implementing agreement is a long-term, but necessary, commitment.

Stating that negotiations on an implementing agreement should "only begin if conditions are right," CHINA noted that a new instrument on BBNJ should not include legally binding mechanisms or be too specific, called for caution in referring to mechanisms for transboundary EIAs and a dispute settlement mechanism, and opposed setting a timetable for negotiating an implementing agreement. INDIA said a viable legal regime is desirable, but cautioned that rights associated with high seas freedoms cannot be compromised by MPAs and other area-based conservation measures. ARGENTINA argued that challenges related to BBNJ cannot be left to unilateral action or organizations with limited membership.

The CONVENTION ON MIGRATORY SPECIES (CMS) drew attention to CMS COP 11 outcomes of relevance to the Working Group, including Resolution 11.25 on advancing ecological networks to address the needs of migratory species, as well as studies on correlations between migratory species and EBSAs. The CBD highlighted CBD COP 12 decisions on EBSAs, ocean acidification and underwater noise, and the Nagoya Protocol COP/MOP 1 decisions on a global multilateral benefit-sharing mechanism and the ABS Clearing-house. The INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION reported on the Global Ocean Observing System, capacity-building and training activities. The UN ENVIRONMENT PROGRAMME (UNEP) reported on relevant activities under the Regional Seas Programme. The FOOD AND AGRICULTURE ORGANIZATION (FAO) reported on work on, *inter alia*, the Code of Conduct for Responsible Fisheries and on deep-sea fish stocks and vulnerable marine ecosystems. The PERMANENT COMMISSION FOR THE SOUTH PACIFIC called for a legally binding agreement under UNCLOS, providing for universal participation and including CBD principles and concepts.

IUCN pointed to the potentially historic importance of the week's deliberations. GREENPEACE called for a strong implementing agreement negotiated in a time-bound manner. WWF recommended an integrated global framework for the governance of BBNJ, to ensure the wellbeing of vulnerable communities that rely on oceans for their livelihoods. The SYLVIA EARLE ALLIANCE/MISSION BLUE lamented that even if the ocean is large and resilient, it is not too big to fail, emphasizing that delegates "have a chance, right now, this week, to encourage governance to safeguard the high seas, as never before in history and maybe, as never again."

CO-CHAIRS' NON-PAPER

MEXICO, BARBADOS, NEW ZEALAND, SOUTH AFRICA and others welcomed the Co-Chairs' non-paper as a good basis for discussion, with SOUTH AFRICA noting the need to differentiate elements that are not part of the 2011 package. NORWAY emphasized the need to adopt a consensus recommendation, suggesting, with ICELAND, going beyond the 2011 package in the recommendation to the General Assembly to ensure clarity and predictability on the kind of instrument and its relationship with existing agreements.

Explaining that the non-paper reflects states' views, including the 13 submitted prior to this meeting, Co-Chair Kohona invited further views on the non-paper. The G77/CHINA asked for more time. NEW ZEALAND, supported by EU, favored reference to the progress made within the Working Group. She considered it appropriate to draw on elements of the non-paper that referred to recognizing, respecting and complementing frameworks and mandates of existing organizations, noting that succinct recommendations could make it easier to reach consensus, while acknowledging the importance of drawing on knowledge, material and views produced to date.

NORWAY recommended finding a balance between specificity and the risk of losing detail, and including references to the mandate of the Working Group in the recommendation. The EU prioritized: indicating that the 2011 package is the basis for the scope of a new implementing agreement; reaffirming the role of UNCLOS; and avoiding duplication of efforts and alterations of the rights and obligations of states under existing agreements. He suggested adding reference to "modern governance principles for the sustainable use and conservation of BBNJ."

IN THE CORRIDORS

The (would-be) last meeting of the Working Group started with reshaped positions on the need for a new implementing agreement on biodiversity beyond areas of national jurisdiction. The vast majority of delegates favor such an agreement, at least in broad strokes. Yet a minority of "still unconvinced" states do not see definitive, convincing arguments that a new treaty would provide the urgent and most effective response to the multiple threats and increasing pressures on deep-sea biodiversity. From both sides, however, commitment was voiced on finding consensus on a way forward.

On the sidelines, quite a few seasoned participants appeared hopeful that the long-awaited launch of formal negotiations towards a new implementing agreement under UNCLOS will finally materialize. Some pointed to the recent serendipitous scientific and media reports highlighting that while there are "clear signs that humans are harming oceans to a remarkable degree" leading to "major extinctions" in the deep seas, this catastrophic trend can still be reversed. In principle, three days are left for the Working Group to live up to these expectations.



MARINE BIODIVERSITY WORKING GROUP HIGHLIGHTS: WEDNESDAY, 21 JANUARY 2015

On Wednesday morning, the Working Group continued exchanging views on a Co-Chairs' non-paper containing draft elements for recommendations to the General Assembly, as well as on four written proposals from delegations. An informal, open, non-negotiating group met at lunchtime to develop an informal working paper to serve as a basis for negotiations. In the afternoon, plenary briefly discussed a draft offered by New Zealand and Mexico as Co-Facilitators of the informal group. The Working Group meeting was then adjourned to allow for consultations on the new draft.

CO-CHAIRS' NON-PAPER

Co-Chair Lijnzaad invited delegates to share further views on how to strengthen the Co-Chairs' non-paper on draft elements for recommendations to the General Assembly, which contains sections on elements related to the: mandate of the Working Group; possible content of an international instrument; and negotiating process. Under the elements related to the possible content of an international agreement, the non-paper proposes that a legally binding agreement to be negotiated should, among others: be based on the 2011 package; reaffirm the role of UNCLOS, avoid duplication and be in harmony with UNCLOS; not alter the rights and obligations of states under existing international agreements; recognize, respect and complement the competence and mandates of existing global and regional organizations; include modern governance principles; establish a regime for transboundary EIA; provide for a mechanism for the sharing of financial benefits from the sustainable use of BBNJ, paying special attention to the needs and interests of indigenous communities whose traditional knowledge about BBNJ can prove pivotal in its utilization; establish a contingency fund that covers harmful effects of pollution on BBNJ; establish a new institution to regulate the conservation and sustainable use of BBNJ; and establish a dispute settlement mechanism. The non-paper then specifies elements related to the negotiating process, highlighting, *inter alia*: the convening of an intergovernmental conference on BBNJ under UNCLOS; the need for a specific date by which the conference should complete its work; the establishment of a preparatory process to prepare for, and make

recommendations to, the conference on the elements to be included in a legally binding agreement; and provisions that the legally binding instrument be negotiated as a package deal.

The G-77/CHINA tabled a revised non-paper, introducing new language on the broad scope and parameters of a possible international instrument, and its feasibility. He recommended that only the elements contained in the 2011 package be retained under the broad scope and parameters of a possible international instrument, while other elements may be included as necessary during the negotiating process. He also proposed detailing the "statement of the problem" to be addressed by the new instrument, describing the instrument as a new tool to tackle the "absence of a comprehensive global regime to address the legal gap relating to the conservation and sustainable use of BBNJ." He further highlighted: a request to the General Assembly to set the timeline for negotiations, as well as the establishment of a preparatory committee (PrepCom), open to member states of the UN, members of specialized agencies or the International Atomic Energy Agency, to prepare for, and make recommendations to, the conference on the elements to be included in a legally binding agreement. He finally suggested stating that the elaboration of the international instrument is feasible from a political, legal and technical standpoint.

Commenting on the Co-Chairs' non-paper, the EU stressed that the 2011 package agreed by the General Assembly be used as the basis for negotiating a new instrument; and tabled draft text to be included in a future resolution by the General Assembly, whereby the Assembly would decide to: convene in 2017 an intergovernmental conference, preceded by a PrepCom, to negotiate an agreement for the implementation of the provisions of UNCLOS relating to the conservation and sustainable use of BBNJ, addressing in particular the elements contained in the 2011 package; and mandate the intergovernmental conference to take into account relevant activities at the sub-regional, regional and global levels with a view to promoting effective implementation of UNCLOS provisions in relation to BBNJ. Commenting on the G-77/China's non-paper, the EU noted areas of commonality, and expressed confidence that the two texts could be merged to represent the views of a "larger group of like-minded states."

MEXICO expressed support for many elements of the G-77/China's and EU's proposals and suggested as additional measures for possible inclusion: recognition of existing global and regional

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organizations' rules, competence and mandates; fundamental principles, such as common heritage of mankind and freedom of the high seas; and adequate economic incentives to ensure viability of all proposals. NEW ZEALAND tabled additional text of a draft recommendation to the General Assembly, reflecting elements to be included in a legally binding agreement under UNCLOS, such as on: addressing the 2011 package; including modern governance principles; and recognizing, respecting and complementing existing legal frameworks.

On the EU's draft text on taking into account relevant activities at sub-regional, regional and global levels, THAILAND favored retaining language in the Co-Chairs' non-paper to "recognize, respect and complement the competence and mandates of existing global and regional organizations" and "foster and strengthen cooperation and coordination between and among states and existing global and regional organizations," arguing this accurately reflects states' concerns about duplication of efforts.

The RUSSIAN FEDERATION cautioned against setting aside elements that could bring the Working Group close to consensus, arguing that the most important task of a PrepCom is identifying areas where it is possible to strengthen cooperation through existing institutions.

Following informal consultations, Co-Chair Lijnzaad asked delegates to share their views on the preferred format for the outcome of the meeting. AUSTRALIA, supported by the EU and the G-77/CHINA, welcomed the high degree of commonality in the core substantive and procedural aspects of the various proposals put forward by delegations. He noted that while the Working Group is mandated to produce recommendations to the General Assembly, it could produce draft General Assembly resolution text directly, suggesting that delegates focus first on finding agreement on key elements and, if time allows, also engage in incorporating them in a draft resolution. The EU added that the Working Group should facilitate the General Assembly's work, cautioning against re-opening discussions in the General Assembly that are already settled in the Working Group. He proposed, supported by NORWAY, to draft a recommendation that could easily be incorporated into a General Assembly resolution. The G-77/CHINA urged delegates to come up with a "document that can take the process forward," emphasizing that only two days are left to fulfill the Working Group's mandate.

Co-Chair Lijnzaad then invited Mexico and New Zealand to chair an informal group to develop an informal working paper based on the proposals tabled, for discussion in plenary in the afternoon. She suggested that the informal group be open-ended, encouraging countries with "skeptical" views to participate in the exercise, explaining it is not meant to serve as negotiations but to formulate a practical step forward.

CO-FACILITATORS' DRAFT

In the afternoon, MEXICO presented a Co-Facilitators' draft intended to provide the basis of negotiations, explaining it was based on the G-77/China's revised non-paper and combined text from the proposals by the EU, Mexico and New Zealand. He reported that issues not reflected in the written proposals were not taken up in the informal group. NEW ZEALAND said that the text includes a chapeau and 11 recommendations for the General Assembly, including: requesting that the current absence of a comprehensive global regime to address the legal

gap relating to the conservation and sustainable use of BBNJ be addressed under UNCLOS; basing negotiations on the 2011 package; considering the political, legal and technical feasibility of elaborating the international instrument; and deciding to convene in either 2017 or 2018 an intergovernmental conference on BBNJ to elaborate a legally binding instrument under UNCLOS with a predetermined deadline and preceded by a PrepCom. The draft also recognizes the need for the negotiations to comply with minimum and non-exclusive elements, including that they: recognize, respect and complement the existing legal frameworks and the competence and mandates of existing global and regional organizations; pay full regard to applicable international law under UNCLOS and other international instruments; be based on a pragmatic approach and promote adequate economic incentives for sustainable development; and include modern governance principles. The draft further invites the General Assembly to establish a calendar of preparatory meetings and set a timeline for negotiations; and appoint co-facilitators to undertake consultations on the modalities for the negotiations. NEW ZEALAND concluded that detailed exchanges on the substance had not been entertained in the informal group, and invited delegates to voice substantive views in plenary.

The G-77/CHINA, supported by the EU, called for time to consult on the draft. The US, supported by JAPAN, reiterated that the case for an international instrument on BBNJ was yet to be made, with the US noting that the 2011 package is a "bare skeleton" and stating that her delegation cannot support the convening of an intergovernmental conference on that basis. JAPAN said that discussions of an international instrument have not been exhaustive, cautioning against excluding the possibility of a non-binding agreement on BBNJ that would encourage universal participation, such as guidelines on BBNJ. Plenary adjourned briefly to allow for consultations. Later in the afternoon, the G-77/CHINA requested, and the Co-Chairs agreed, to adjourn the meeting until the following day to allow more time for consultations on the draft.

IN THE CORRIDORS

True to the expression of commitment from the previous day, delegations got straight down to business on Wednesday, with four proposals being tabled first thing in the morning, all loosely based on the Co-Chairs' draft elements. The proposals appeared to feature only slight differences, which made for a relatively smooth process of producing a common basis for plenary negotiations, thanks to an informal, open "non-negotiating group" that convened at lunchtime.

The trade-off that kept delegates in evening consultations was the role versus the timelines of the different phases of proposed "real" negotiations. As one experienced delegate opined, if more time is allocated to a preparatory process (the latest date for its conclusion being suggested is 2018), then the PrepCom may need to engage not only in structuring future negotiations but also in drafting the new instrument. Alternatively, if the intergovernmental conference will need to do more than just rubber-stamp the PrepCom outcome, then it should "start sooner rather than later." In any event, considering other multilateral environmental processes, the present divergence around whether a future international instrument should be legally binding or not has not prevented the launch of negotiations before.



MARINE BIODIVERSITY WORKING GROUP HIGHLIGHTS: THURSDAY, 22 JANUARY 2015

On Thursday, delegates negotiated on the basis of the draft prepared by New Zealand and Mexico as Co-Facilitators of Wednesday's informal group and a proposal by the G-77/China. Negotiations continued into the evening on a revised draft ("working document").

CO-FACILITATORS' DRAFT

In the morning, Co-Chair Lijnzaad proposed discussing the Co-Facilitators' draft paragraph by paragraph, underscoring that "nothing is agreed until everything is agreed." The G-77/CHINA informed plenary they had not yet reached agreement on text related to: convening an intergovernmental conference; establishing a PrepCom; recognizing minimum and non-exclusive elements for negotiations; appointing co-facilitators of consultations to determine negotiating modalities; and establishing a calendar of preparatory meetings and a timeline for negotiations. In the afternoon, the G-77/China tabled a proposal in that regard.

RIO+20 MANDATE: On a draft recommendation for the General Assembly to reaffirm "The Future We Want," the EU proposed adding reference to "the commitment in paragraph 162" of the Rio+20 outcome document. On text referring to states' commitment to addressing issues of conservation and sustainable use of BBNJ, the G-77/CHINA suggested adding "building on the work of the Working Group." Following a query from CANADA, Co-Chair Lijnzaad explained this addition reflects language from General Assembly Resolution 69/245.

PROGRESS BY THE WORKING GROUP: On a draft recommendation for the General Assembly to welcome the progress made by the Working Group to prepare for a decision on the development of an international instrument under UNCLOS, the RUSSIAN FEDERATION, opposed by the EU, proposed welcoming the "exchange of views" on the scope, parameters and feasibility, rather than "progress," and deleting reference to the development of an international instrument.

LEGAL GAPS: On a draft recommendation for the General Assembly to note with concern the absence of a comprehensive global regime to address the legal gap relating to BBNJ and the need for an implementing agreement, the EU proposed referring to a "coherent and integrated," rather than "comprehensive," global regime, and deleting text on addressing the legal gap. The G-77/CHINA favored referring to "a new agreement to address this problem," rather than to an implementing agreement. The

EU emphasized that a new agreement should become a third implementing agreement under UNCLOS, expressing willingness to compromise on "a new agreement under UNCLOS." The US, ICELAND, the RUSSIAN FEDERATION, JAPAN and CANADA did not support the paragraph, with the US arguing that there are existing tools to address the conservation and sustainable use of BBNJ. ICELAND considered the paragraph "too political," pointing to its focus on "legal gaps" and "the status quo." The RUSSIAN FEDERATION opined that there have been no discussions in the Working Group on legal gaps in the current regime. JAPAN reserved his right to further comment on the paragraph. NORWAY suggested as compromise language "noting the need to improve the global regime," with the EU emphasizing that the paragraph reflected the view of a "significant majority." The RUSSIAN FEDERATION recalled the need for the Working Group to work on the basis of consensus.

2011 PACKAGE: On a draft recommendation for the General Assembly to consider that negotiations should be based on the topics identified in the 2011 package, the G-77/CHINA preferred for the Assembly to "decide" that negotiations "shall address" the topics of the 2011 package. The EU suggested referring to the "elements" of the package, rather than to "topics." NORWAY encouraged making the text more comprehensible to outside stakeholders, suggesting quoting the text of the package and adding a reference to the General Assembly resolution that endorsed it. The RUSSIAN FEDERATION expressed reservation in relation to references to "negotiations," as these are linked to references to a "PrepCom" in other sections of the draft.

FEASIBILITY: On a draft recommendation for the General Assembly to also consider that the elaboration of the international instrument is feasible from a political, legal and technical standpoint, the G-77/CHINA preferred that the Assembly "affirm" such feasibility. CANADA, the US, the REPUBLIC OF KOREA, the RUSSIAN FEDERATION and JAPAN recommended deleting the whole recommendation, opposed by the EU, who considered it an "important sign of political commitment" and recalled that the Working Group is mandated to reach conclusions on feasibility.

NON-PARTIES TO UNCLOS: The G-77/CHINA suggested additional text, whereby future negotiations "will not prejudice the accession to UNCLOS by states non-party to it." Noting that although the G-77/CHINA is "a big family," the position on states non-party to UNCLOS is delicate, and recalling her national delegation's reservation on the Rio+20 outcome document related to BBNJ, VENEZUELA offered an alternative

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proposal text on “ensuring that the recommendation on a binding instrument and the resulting negotiations be open to all states, particularly states non-party to UNCLOS, without implying the acceptance of any legal obligation from instruments that have not been explicitly accepted by these states.” Co-Chair Lijnzaad noted that this matter has already been addressed under the UN Fish Stocks Agreement. The EU said that a future, third implementing agreement under UNCLOS should be open to states non-party to UNCLOS. In the afternoon, the G-77/CHINA offered text on “recognizing that neither the participation in the negotiations nor their outcome may affect the legal status of non-parties *vis-à-vis* UNCLOS and/or any other related agreement or instrument they are not party to,” and VENEZUELA withdrew her proposal.

FORMAT AND TIMELINES OF A FUTURE PROCESS:

The G-77/CHINA tabled a proposal “to convene, under UN auspices, an intergovernmental conference on BBNJ to elaborate a legally binding instrument under UNCLOS,” whereby: a PrepCom, open to all UN states members, members of specialized agencies, parties and non-parties to UNCLOS, and UN observers, prepares for, and make recommendations to the conference on the elements to be included in the agreement, as well as provisional rules of procedure, taking into account the views expressed in the Co-Chairs’ reports and compilation of submissions to the Working Group, with the Group being terminated; the precise mandate, rules of procedure and calendar of meetings of the PrepCom will be established by the General Assembly, with the PrepCom starting its work in 2016; and the Assembly will decide, before the end of its 71st session, on the specific date of the intergovernmental conference and a timeline for the negotiations taking into account progress reports from the PrepCom. The G-77/CHINA then proposed deleting text on the need for the negotiations to comply with minimum and non-exclusive elements, arguing that the list of elements have not been agreed upon and that the PrepCom would discuss them.

ICELAND, NEW ZEALAND, MEXICO, JAPAN, the RUSSIAN FEDERATION, CANADA, AUSTRALIA and the REPUBLIC OF KOREA expressed concern over the proposed deletion, particularly of text calling for recognizing, respecting and complementing the existing legal framework and the competence and mandates of existing global and regional organizations. NEW ZEALAND, supported by MEXICO, CANADA, AUSTRALIA, the REPUBLIC OF KOREA and the RUSSIAN FEDERATION, proposed alternative text to “affirm the need to recognize and respect the existing legal frameworks and the competence and mandates of global and regional bodies,” with JAPAN adding that the negotiations also do “not undermine” existing legal frameworks. SWITZERLAND recommended referring also to the CBD, including with regard to the Nagoya Protocol, and UNEP; and the REPUBLIC OF KOREA suggested also adding FAO. ARGENTINA cautioned that the PrepCom may need to refer differently to existing regional and sectoral organizations. The RUSSIAN FEDERATION suggested tasking the PrepCom with deciding which issues should be dealt with under a new instrument and which under existing instruments.

WORKING DOCUMENT

Delegates agreed to reaffirm the “commitment in paragraph 162 of the Rio+20 outcome document.” The G-77/CHINA, supported by the EU and MEXICO, agreed to welcome the exchange of views on the scope, parameters and feasibility of an international instrument under UNCLOS and the progress made within the Working Group. Delegates also retained text regarding the development of an international instrument under UNCLOS.

The G-77/CHINA, opposed by CANADA, ICELAND, JAPAN and the US, insisted on retaining reference to “the legal gap” as the reason for a new implementing agreement. NORWAY proposed alternative text on the need to address “any legal gaps” and for a new implementing agreement.

The EU recommended that the General Assembly “decide that the negotiations shall address the elements” of the 2011 package. The RUSSIAN FEDERATION argued that, as endorsed by the General Assembly, the package includes not only subject-matter elements but also a process to identify ways forward including through the implementation of existing instruments. ARGENTINA, supported by the EU, objected that the package only refers to subject-matter elements “together and as a whole,” whereas the process foreseen in 2011 has been superseded by Rio+20. The RUSSIAN FEDERATION reiterated that without common understanding of gaps, a PrepCom should indicate which elements of the package can be included in a new instrument and which can be addressed through implementation of existing instruments.

Delegates also supported text affirming that elaborating the international instrument is politically, legally and technically feasible.

AUSTRALIA, supported by the EU, the RUSSIAN FEDERATION, ICELAND, CANADA and JAPAN, but opposed by the G-77/CHINA, proposed new text reflecting the need to “recognize, respect and not undermine UNCLOS and other relevant legal instruments and frameworks, and relevant global, regional and sectoral bodies and arrangements.” The EU, with NORWAY, proposed retaining reference to “fostering coordination and cooperation” between a new and existing instruments.

The US and the RUSSIAN FEDERATION, opposed by the G-77/CHINA, could not support convening an intergovernmental conference, but favored moving forward on “an international instrument” through a PrepCom. The EU restated its position on the need for a “legally binding” instrument under UNCLOS. NEW ZEALAND, with NORWAY, supported taking steps towards launching negotiations by convening a conference.

IN THE CORRIDORS

As negotiations got underway on the Co-Facilitators’ draft, the recurring dividing lines which have haunted the Working Group since its inception resurfaced in full force: are there legal gaps in the international landscape *vis-à-vis* BBNJ? Is there a need for a new implementing agreement under UNCLOS to fill them? And if so, what about states that are non-party to UNCLOS? In other words, has the Working Group over the past year and a half been able to shed necessary light on the possible scope, parameters and feasibility of a new instrument on BBNJ, considering the various ways states may be interpreting the Rio+20 mandate?

As the clock ticks and scientists warn that we are on the verge of mass extinctions in the oceans, the Working Group proceeded in fits and starts on its penultimate day, as the G-77/China appeared to struggle to find a common position on the format and timelines (if any) for next steps. Several veterans were already speculating that if the process moves into formal negotiating mode, country groupings will need to be re-adjusted to better reflect differing stakes in relation to deep-sea biodiversity and the implications of its enhanced conservation.

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of the BBNJ Working Group will be available on Monday, 26 January 2015, online at: <http://www.iisd.ca/oceans/marinebiodiv9/>



SUMMARY OF THE NINTH MEETING OF THE WORKING GROUP ON MARINE BIODIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION: 20-23 JANUARY 2015

The ninth meeting of the *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (hereafter, the Working Group) convened from 20-23 January 2015 at UN Headquarters in New York. The meeting was the last of three meetings (April 2014, June 2014 and January 2015) convened by the UN General Assembly through its resolution 68/70 to discuss the scope, parameters and feasibility of a possible new international instrument on marine biodiversity in areas beyond national jurisdiction (BBNJ) under the UN Convention on the Law of the Sea (UNCLOS).

The meeting was attended by around 200 participants, including national delegations, intergovernmental organizations and non-governmental organizations (NGOs). Following intense informal negotiations into the early hours of Saturday, delegates reached consensus on recommendations for a decision to be taken at the sixty-ninth session of the UN General Assembly to develop a new legally binding instrument on BBNJ under UNCLOS. Delegates also reached consensus on a negotiating process, by establishing a preparatory meeting to make recommendations on elements of a draft text of a legally binding instrument to the General Assembly in 2017 and for the Assembly to decide at its seventy-second session whether to convene an intergovernmental conference to elaborate the text of the agreement. This decision effectively concludes the mandate of the Working Group.

Although many were disappointed that the recommendation did not designate a date for convening of an intergovernmental conference, the meeting did succeed in charting the way forward for negotiations and, for the first time, reaching consensus on the legally binding nature of a future agreement on the conservation and sustainable use of BBNJ.

A BRIEF HISTORY OF MARINE BIODIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION

The conservation and sustainable use of BBNJ is increasingly attracting international attention, as scientific information, albeit insufficient, reveals the richness and vulnerability of such biodiversity, particularly in seamounts, hydrothermal vents and cold-water coral reefs, while concerns grow about the increasing anthropogenic pressure posed by existing and emerging activities, such as fishing and bioprospecting, in the deep sea.

UNCLOS, which entered into force on 16 November 1994, sets forth the rights and obligations of states regarding the use of the oceans, their resources, and the protection of the marine and coastal environment. Although UNCLOS does not refer expressly to marine biodiversity, it is commonly regarded as establishing the legal framework for all activities in the oceans. The Convention on Biological Diversity (CBD), which entered into force on 29 December 1993, defines biodiversity and aims to promote its conservation, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the use of genetic resources. In areas beyond national jurisdiction (ABNJ), the Convention applies to processes and activities carried out under the jurisdiction or control of its parties. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits

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Arising from their Utilization, which entered into force on 12 October 2014, applies to genetic resources within the scope of CBD Article 15 (Access to Genetic Resources) and to traditional knowledge associated with genetic resources within the scope of the Convention.

In resolution 59/24 of 2004, the General Assembly established an *ad hoc* open-ended informal working group to study issues relating to the conservation and sustainable use of BBNJ, and called upon states and international organizations to take action urgently to address, in accordance with international law, destructive practices that have adverse impacts on marine biodiversity and ecosystems.

FIRST MEETING OF THE WORKING GROUP: The first meeting of the Working Group (13-17 February 2006, New York) exchanged views on institutional coordination, the need for short-term measures to address illegal, unregulated and unreported (IUU) fishing and destructive fishing practices, marine genetic resources (MGRs), avoiding the adverse impacts of marine scientific research (MSR) on marine biodiversity, and facilitating the establishment of high seas marine protected areas (MPAs). A Co-Chairs' summary of trends and a report of the discussions on issues, questions and ideas related to the conservation and sustainable use of BBNJ was transmitted to the General Assembly as an addendum to the report of the Secretary-General on oceans and the law of the sea.

SECOND MEETING OF THE WORKING GROUP: The second meeting of the Working Group (28 April-2 May 2008, New York) produced a Co-Chairs' Draft Joint Statement identifying issues for the General Assembly to consider referring back to the Working Group, including: more effective implementation and enforcement of existing agreements; strengthening of cooperation and coordination; development of an effective environmental impact assessment (EIA) tool for oceans management; development of area-based management tools; practical measures to address the conservation and sustainable use of MGRs; and continued and enhanced MSR.

THIRD MEETING OF THE WORKING GROUP: The third meeting of the Working Group (1-5 February 2010, New York) agreed, by consensus, to a package of recommendations to the General Assembly on, *inter alia*: including in the Secretary-General's report on oceans and the law of the sea information on EIAs undertaken for planned activities in ABNJ; recognizing the importance of further developing scientific and technical guidance on the implementation of EIAs on planned activities in ABNJ, including consideration of assessments of cumulative impacts; calling upon states to work through competent international organizations towards the development of a common methodology for the identification and selection of marine areas that may benefit from protection based on existing criteria; calling upon states, in the context of the Working Group's mandate, to make progress in the discussions on MGRs in ABNJ; and reconvening the Working Group in 2011, to provide further recommendations to the General Assembly.

FOURTH MEETING OF THE WORKING GROUP: The fourth meeting of the Working Group (31 May-3 June 2011, New York) adopted, by consensus, a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of BBNJ, by identifying gaps and ways forward,

including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS. The recommendations also include a "package" of issues to be addressed as a whole in this process, namely: MGRs, including questions on benefit-sharing; measures such as EIAs and area-based management tools, including MPAs; and capacity building and the transfer of marine technology.

FIFTH MEETING OF THE WORKING GROUP: The fifth meeting of the Working Group (7-11 May 2012, New York) engaged in substantive debates on the gaps and ways forward in plenary and intense negotiations, mostly in a government-only informal setting, on whether to recommend the launch of formal negotiations on a new implementing agreement under UNCLOS. The Working Group eventually recommended by consensus that the General Assembly task it to continue to consider all issues under its mandate as a package with a view to making progress on ways forward to fulfill its mandate. The Working Group also adopted terms of reference for two intersessional workshops to improve understanding of the issues before it and thus lead to a more informed and productive debate at its next meeting.

UN CONFERENCE ON SUSTAINABLE DEVELOPMENT (RIO+20): The UN Conference on Sustainable Development (20-22 June 2012, Rio de Janeiro, Brazil) expressed a commitment for states to address, on an urgent basis, building on the work of the Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of BBNJ, including by taking a decision on the development of an international instrument under UNCLOS.

SIXTH MEETING OF THE WORKING GROUP: The sixth meeting of the Working Group (19-23 August 2013, New York) resulted in a consensus recommendation on establishing a preparatory process within the Working Group to fulfill the Rio+20 commitment by focusing on the scope, parameters and feasibility of an international instrument under UNCLOS, calling upon the Working Group to be convened twice in 2014 and at least once in 2015, with a view to preparing for a decision on BBNJ by the General Assembly before the end of its sixty-ninth session.

SEVENTH MEETING OF THE WORKING GROUP: The seventh meeting of the Working Group (1-4 April 2014, New York) engaged in an interactive substantive debate on the scope, parameters and feasibility of an international instrument under UNCLOS, focusing on: the overall objective and starting point; the legal framework for an international instrument; the relationship to other instruments; guiding approaches; guiding principles; each of the elements of the "package;" and enabling elements and means of implementation.

EIGHTH MEETING OF THE WORKING GROUP: The eighth meeting of the Working Group (16-19 June 2014, New York) engaged in a more detailed substantive discussion on the scope, parameters and feasibility of an international instrument under UNCLOS, and called upon the Co-Chairs to prepare draft elements of a recommendation to the General Assembly, based on the "package," also outlining the main elements of convergence that emerged in the Working Group, for consideration at the next meeting.

WORKING GROUP REPORT

Co-Chair Liesbeth Lijnzaad (Netherlands) opened the meeting on Tuesday morning, 20 January 2015. Speaking on behalf of the UN Secretary-General, Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and UN Legal Counsel, noted that differences still remain in the deliberations on BBNJ, and called upon delegates to “crystallize ideas in areas of convergence” in order to meet the deadline to submit recommendations to the General Assembly.

Co-Chair Palitha Kohona (Sri Lanka) highlighted growing support for a new legally binding instrument on BBNJ under UNCLOS, noting that any such instrument should be holistic and take into account the needs of both developing and developed countries. Co-Chair Lijnzaad reported that a synthesis of the key ideas discussed in the two previous Working Group meetings had been circulated to national delegations in December 2014 as a Co-Chairs’ non-paper containing draft elements of a recommendation to the General Assembly, as well as an updated compilation of state submissions.

Co-Chair Lijnzaad introduced, and delegates approved without amendment, the provisional agenda (A/AC.276/L.15) and the draft format, annotated provisional agenda and organization of work (A/AC.276/L.16).

GENERAL STATEMENTS

On Tuesday, delegates made general statements. South Africa, for the Group of 77 and China (G-77/China), emphasized: the legal gap concerning UNCLOS provisions on access and benefit-sharing (ABS) from MGRs; the common heritage of mankind as part of customary international law and the guiding principle for a new implementing agreement; and the 2011 package, including benefit-sharing taking into account intellectual property rights (IPRs), MSR, capacity building and technology transfer. Morocco, on behalf of the African Group, argued that the adoption of a legally binding agreement under UNCLOS is the only way to resolve issues of exploitation of BBNJ. Trinidad and Tobago, on behalf of the Caribbean Community (CARICOM), stressed the need for a new implementing agreement under UNCLOS that builds upon the common heritage principle and strengthens UNCLOS by addressing gaps in the conservation and use of MGRs in ABNJ. Underlining that the time for action is now, Maldives, for the Alliance of Small Island Developing States (AOSIS), called for launching negotiations on a new implementing agreement as soon as possible.

Italy, for the European Union (EU), urged convening an intergovernmental conference as soon as possible and, supported by Singapore, said it should complete work within an agreed deadline. Morocco called for convening an intergovernmental conference to draft a legally binding instrument on BBNJ, stressing that the 2011 package has already been agreed by the General Assembly and should not be re-opened. Jamaica said that there is sufficient momentum for the Working Group to recommend that the General Assembly mandate formal negotiations towards an international agreement building upon UNCLOS, the ecosystem approach, and the common heritage of mankind principle.

Mexico noted growing consensus in different regions on the need for a new legally binding instrument to complement

UNCLOS and international customary law; and called for a pragmatic approach to formal negotiations based on the framework of the existing legal regime, cost-efficiency, and the promotion of economic incentives. Costa Rica suggested that recommendations to the General Assembly should be general in calling for an intergovernmental conference, accompanied by a preparatory process, on the basis of the 2011 package. Venezuela called attention to states that are not party to UNCLOS, noting a new instrument on BBNJ could be developed under the CBD. Peru suggested ensuring that a new agreement be open to all states.

Australia suggested making clear and concrete consensus recommendations to the General Assembly providing succinct guidance on scope and parameters of a new implementing agreement, as well as on a possible process and timelines for inclusive and transparent negotiations, including a preparatory process for an intergovernmental conference. New Zealand argued that the increasing pressures and cumulative impacts on BBNJ, as well as the legal gaps in, and fragmentation of, the existing legal framework, demonstrate the need for a new implementing agreement. Singapore recommended postponing discussion of specific concepts to the formal negotiations of an implementing agreement. Sri Lanka emphasized the need to address IPRs, and opportunities for sharing the results of MSR.

Iceland reiterated his position that a new international instrument should focus on legal gaps, such as MGRs, and cautioned against re-opening issues that are already subject to the existing international regime, such as fisheries. Canada stated that she remains to be convinced that launching negotiations on a new instrument is the best way to urgently achieve actual results. She suggested that potential negotiations should be guided by: the need to preserve the balance of interests, and existing rights and obligations; the respect of regional and sectoral frameworks; targeted and realistic measures based on best available scientific knowledge; the avoidance of excessively bureaucratic processes for MSR; inclusion of intergovernmental, non-governmental and industry stakeholders; and a sufficient timeframe for fully debating options.

Japan said that the conservation and sustainable use of BBNJ should not undermine existing international frameworks. The Russian Federation expressed skepticism over the need for a new agreement, and favored excluding high-seas fishing and identifying legal gaps before negotiations begin.

The US opined that a persuasive case for a new implementing agreement has yet to be made, arguing that the 2011 package is no more than a list of potential topics to be covered. The Republic of Korea remarked that consensus is yet to be achieved on several issues, including on how to ensure compatibility with existing instruments and bodies without affecting their mandate. Arguing that resolving all issues falls outside the Working Group’s mandate, Guatemala stated that launching negotiations on a new implementing agreement is a long-term, but necessary, commitment.

Stating that negotiations on an implementing agreement should “only begin if conditions are right,” China noted that a new instrument on BBNJ should not include legally binding mechanisms or be too specific, cautioning against references to mechanisms for transboundary EIAs and a dispute settlement

mechanism, and opposed setting a timetable for negotiating an implementing agreement. India said a viable legal regime is desirable, but cautioned that rights associated with high seas freedoms cannot be compromised by MPAs and other area-based conservation measures. Argentina argued that challenges related to BBNJ cannot be left to unilateral action or organizations with limited membership.

The Convention on Migratory Species (CMS) drew attention to CMS COP 11 outcomes of relevance to the Working Group, including resolution 11.25 on advancing ecological networks to address the needs of migratory species, as well as studies on correlations between migratory species and ecologically and biologically significant marine areas (EBSAs). The CBD highlighted CBD COP 12 decisions on EBSAs, ocean acidification and underwater noise, and Nagoya Protocol COP/MOP 1 decisions on a global multilateral benefit-sharing mechanism and the ABS Clearing-house. The Intergovernmental Oceanographic Commission reported on the Global Ocean Observing System, and capacity-building and training activities. The UN Environment Programme (UNEP) reported on relevant activities under the Regional Seas Programme. The Food and Agriculture Organization (FAO) reported on work on, *inter alia*, the Code of Conduct for Responsible Fisheries and deep-sea fish stocks and vulnerable marine ecosystems. The Permanent Commission for the South Pacific called for a legally binding agreement under UNCLOS, providing for universal participation and including CBD principles and concepts.

The International Union for Conservation of Nature (IUCN) pointed to the potentially historic importance of the week's deliberations. Greenpeace called for a strong implementing agreement negotiated in a time-bound manner. The World Wide Fund for Nature (WWF) recommended an integrated global framework for the governance of BBNJ, to ensure the wellbeing of vulnerable communities that rely on oceans for their livelihoods. The Sylvia Earle Alliance/Mission Blue lamented that even if the ocean is large and resilient, it is not too big to fail, emphasizing that delegates "have a chance, right now, this week, to encourage governments to safeguard the high seas, as never before in history and maybe, as never again."

DISCUSSION OF THE CO-CHAIRS' NON-PAPER

On Tuesday and Wednesday, the Working Group considered a Co-Chairs' non paper containing draft elements of recommendations to the sixty-ninth session of the General Assembly. The paper contained sections on elements related to the: mandate of the Working Group; possible content of an international instrument; and negotiating process. Under the elements related to the possible content of an international agreement, the non-paper proposed that a legally binding agreement to be negotiated should, among others:

- be based on the 2011 package;
- reaffirm the role of UNCLOS;
- avoid duplication and be in harmony with UNCLOS;
- not alter the rights and obligations of states under existing international agreements;
- recognize, respect and complement the competence and mandates of existing global and regional organizations;
- include modern governance principles;
- establish a regime for transboundary EIA;

- provide for a mechanism for the sharing of financial benefits from the sustainable use of BBNJ, paying special attention to the needs and interests of indigenous communities whose traditional knowledge about BBNJ can prove pivotal in its utilization;
- establish a contingency fund that covers harmful effects of pollution on BBNJ;
- establish a new institution to regulate the conservation and sustainable use of BBNJ; and
- establish a dispute settlement mechanism.

The non-paper then specified elements related to the negotiating process, highlighting, *inter alia*: the convening of an intergovernmental conference on BBNJ under UNCLOS; the need for a specific date by which the conference should complete its work; the establishment of a preparatory process to prepare for, and make recommendations to, the conference on the elements to be included in a legally binding agreement; and provisions that the legally binding instrument be negotiated as a package deal.

Mexico, Barbados, New Zealand, South Africa and others welcomed the Co-Chairs' non-paper as a good basis for discussion, with South Africa noting the need to differentiate elements that are not part of the 2011 package. Norway emphasized the need to adopt a consensus recommendation, suggesting, with Iceland, going beyond the 2011 package in the recommendation to the General Assembly to ensure clarity and predictability on the kind of instrument and its relationship with existing agreements.

Explaining that the non-paper drafted by the Co-Chairs in part reflects the 13 submissions submitted by states prior to this meeting, Co-Chair Kohona invited further views on the non-paper. New Zealand, supported by the EU, favored the non-paper's reference to the progress made within the Working Group. She considered it appropriate to draw on elements of the non-paper that referred to recognizing, respecting and complementing frameworks and mandates of existing organizations, noting that succinct recommendations could make it easier to reach consensus, while acknowledging the importance of drawing on knowledge, material and views produced to date.

Norway cautioned against specificity at the risk of losing detail, and advised including references to the mandate of the Working Group in the recommendation. The EU prioritized: indicating that the 2011 package is the basis for the scope of a new implementing agreement; reaffirming the role of UNCLOS; and avoiding duplication of efforts and alterations of the rights and obligations of states under existing agreements. He suggested adding reference to "modern governance principles for the sustainable use and conservation of BBNJ." The G-77/China asked for more time to coordinate on this issue.

On Wednesday, the G-77/China tabled a revised non-paper, introducing new language on the scope and parameters of a possible international instrument, and its feasibility. He recommended that only the elements contained in the 2011 package be retained under the scope and parameters of a possible international instrument, while other elements may be included as necessary during the negotiating process. He also proposed detailing the "statement of the problem" to be addressed by the new instrument, describing the instrument as a new tool to

tackle the “absence of a comprehensive global regime to address the legal gap relating to the conservation and sustainable use of BBNJ.” He further highlighted: a request to the General Assembly to set the timeline for negotiations, as well as the establishment of a preparatory committee (PrepCom), open to member states of the UN, members of specialized agencies or the International Atomic Energy Agency, to prepare for, and make recommendations to, an intergovernmental conference on the elements to be included in a legally binding agreement. He also suggested stating that the elaboration of the international instrument is feasible from a political, legal and technical standpoint.

Commenting on the Co-Chairs’ non-paper, the EU stressed that the 2011 package agreed by the General Assembly be used as the basis for negotiating a new instrument; and tabled draft text to be included in a future resolution by the General Assembly, whereby the Assembly would decide to: convene in 2017 an intergovernmental conference, preceded by a PrepCom, to negotiate an agreement for the implementation of the provisions of UNCLOS relating to the conservation and sustainable use of BBNJ, addressing in particular the elements contained in the 2011 package; and mandate an intergovernmental conference to take into account relevant activities at the sub-regional, regional and global levels with a view to promoting effective implementation of UNCLOS provisions in relation to BBNJ. Commenting on the G-77/China’s non-paper, the EU noted areas of commonality, and expressed confidence that the two texts could be merged to represent the views of a “larger group of like-minded states.”

Mexico expressed support for many elements of the G-77/China’s and EU’s proposals and suggested as additional measures for possible inclusion: recognition of existing global and regional organizations’ rules, competence and mandates; fundamental principles, such as common heritage of mankind and freedoms of the high seas; and adequate economic incentives to ensure viability of all proposals. New Zealand tabled additional text of a draft recommendation to the General Assembly, reflecting elements to be included in a legally binding agreement under UNCLOS, such as on: addressing the 2011 package; including modern governance principles; and recognizing, respecting and complementing existing legal frameworks.

On the EU’s draft text on taking into account relevant activities at sub-regional, regional and global levels, Thailand favored retaining language in the Co-Chairs’ non-paper to “recognize, respect and complement the competence and mandates of existing global and regional organizations” and “foster and strengthen cooperation and coordination between and among states and existing global and regional organizations,” arguing this accurately reflects states’ concerns about duplication of efforts.

The Russian Federation cautioned against setting aside elements that could bring the Working Group close to consensus, arguing that the most important task of a PrepCom is identifying areas where it is possible to strengthen cooperation through existing institutions.

Following informal consultations, Co-Chair Lijnzaad asked delegates to share their views on the preferred format for the outcome of the meeting. Australia, supported by the EU and

the G-77/China, welcomed the high degree of commonality in the core substantive and procedural aspects of the various proposals put forward by delegations. He noted that while the Working Group is mandated to produce recommendations to the General Assembly, it could produce a draft General Assembly resolution directly, suggesting that delegates focus first on finding agreement on key elements and, if time allows, also engage in incorporating them in a draft resolution. The EU added that the Working Group should facilitate the General Assembly’s work, cautioning against re-opening discussions in the General Assembly that are already settled in the Working Group. He proposed, supported by Norway, to draft recommendations that could easily be incorporated into a General Assembly resolution. The G-77/China urged delegates to come up with a “document that can take the process forward,” emphasizing that only two days were left to fulfill the Working Group’s mandate.

Co-Chair Lijnzaad then invited Penelope Ridings, New Zealand, and Max Alberto Diener Sala, Mexico, to co-facilitate an informal group to develop an informal working paper based on the proposals tabled, for discussion in plenary in the afternoon. She suggested that the informal group be open-ended, encouraging countries with “skeptical” views to participate in the exercise, explaining it is not meant to serve as negotiations but to formulate a practical step forward.

DISCUSSION OF THE CO-FACILITATORS’ DRAFT

On Wednesday afternoon, Co-Facilitator Diener Sala presented the Co-Facilitators’ draft intended to provide the basis for negotiations, explaining it was based on the G-77/China’s revised non-paper and combined text from the proposals by the EU, Mexico and New Zealand. He reported that issues not reflected in the written proposals were not taken up in the informal group. Co-Facilitator Ridings said that the text includes a chapeau and 11 recommendations for the General Assembly, including: requesting that the current absence of a comprehensive global regime to address the legal gap relating to the conservation and sustainable use of BBNJ be addressed under UNCLOS; basing negotiations on the 2011 package; considering the political, legal and technical feasibility of elaborating the international instrument; and deciding to convene in either 2017 or 2018 an intergovernmental conference on BBNJ to elaborate a legally binding instrument under UNCLOS with a predetermined deadline and preceded by a PrepCom. The draft also recognized the need for the negotiations to comply with minimum and non-exclusive elements, including that they: recognize, respect and complement the existing legal frameworks and the competence and mandates of existing global and regional organizations; pay full regard to applicable international law under UNCLOS and other international instruments; be based on a pragmatic approach and promote adequate economic incentives for sustainable development; and include modern governance principles. The draft further invites the General Assembly to establish a calendar of preparatory meetings and set a timeline for negotiations; and appoint co-facilitators to undertake consultations on the modalities for the negotiations. Co-Facilitator Ridings concluded that detailed exchanges on the substance had not been entertained in the informal group, and invited delegates to voice substantive views in plenary.

The G-77/China, supported by the EU, called for time to consult on the draft. The US, supported by Japan, reiterated that the case for an international instrument on BBNJ was yet to be made. The US, noting that the 2011 package is a “bare skeleton,” stated that her delegation cannot support convening an intergovernmental conference on that basis. Japan said that discussions of an international instrument have not been exhaustive, cautioning against excluding the possibility of a non-binding agreement on BBNJ that would encourage universal participation, such as guidelines on BBNJ. Plenary adjourned briefly to allow for consultations. Later in the afternoon, the G-77/China requested, and the Co-Chairs agreed, to adjourn the meeting until the following day to allow more time for consultations on the draft.

On Thursday morning, delegates undertook a paragraph-by-paragraph reading of the Co-Facilitators’ draft, with Co-Chair Lijnzaad underscoring that “nothing is agreed until everything is agreed.” The G-77/China informed plenary they had not yet reached agreement on text related to: convening an intergovernmental conference; establishing a PrepCom; recognizing minimum and non-exclusive elements for negotiations; appointing co-facilitators of the consultations to determine negotiating modalities; and establishing a calendar of preparatory meetings and a timeline for negotiations. In the afternoon, the G-77/China tabled a proposal in that regard.

RIO+20 MANDATE: On a draft recommendation for the General Assembly to reaffirm *The Future We Want*, the EU proposed adding reference to “the commitment in paragraph 162” of the Rio+20 outcome document. On text referring to states’ commitment to addressing issues of conservation and sustainable use of BBNJ, the G-77/China suggested adding “building on the work of the Working Group.” Following a query from Canada, Co-Chair Lijnzaad explained this addition reflects language from General Assembly resolution 69/245.

PROGRESS BY THE WORKING GROUP: On a draft recommendation for the General Assembly to welcome the progress made by the Working Group to prepare for a decision on the development of an international instrument under UNCLOS, the Russian Federation, opposed by the EU, proposed welcoming the “exchange of views” on the scope, parameters and feasibility, rather than “progress,” and deleting reference to the development of an international instrument.

LEGAL GAPS: On a draft recommendation for the General Assembly to note with concern the absence of a comprehensive global regime to address the legal gap relating to BBNJ and the need for an implementing agreement, the EU proposed referring to a “coherent and integrated,” rather than “comprehensive,” global regime, and deleting text on addressing the legal gap. The G-77/China favored referring to “a new agreement to address this problem,” rather than to an implementing agreement. The EU emphasized that a new agreement should become a third implementing agreement under UNCLOS, expressing willingness to compromise on “a new agreement under UNCLOS.” The US, Iceland, the Russian Federation, Japan and Canada did not support the paragraph, with the US arguing that there are existing tools to address the conservation and sustainable use of BBNJ. Iceland considered the paragraph “too political,” pointing to its focus on “legal gaps” and “the status quo.” The

Russian Federation opined that there have been no discussions in the Working Group on legal gaps in the current regime. Japan reserved his right to further comment on the paragraph. Norway suggested as compromise language “noting the need to improve the global regime,” with the EU emphasizing that the paragraph reflected the view of a “significant majority.” The Russian Federation recalled the need for the Working Group to work on the basis of consensus.

THE 2011 PACKAGE: On a draft recommendation for the General Assembly to consider that negotiations should be based on the topics identified in the 2011 package, the G-77/China preferred for the Assembly to “decide” that negotiations “shall address” the topics of the 2011 package. The EU suggested referring to the “elements” of the package, rather than to “topics.” Norway encouraged making the text more comprehensible to outside stakeholders, suggesting quoting the text of the package and adding a reference to the General Assembly resolution that endorsed it. The Russian Federation expressed his reservations to referencing “negotiations,” as these are linked to references to a “PrepCom” in other sections of the draft.

FEASIBILITY: On a draft recommendation for the General Assembly to also consider that the elaboration of the international instrument is feasible from a political, legal and technical standpoint, the G-77/China preferred that the Assembly “affirm” such feasibility. Canada, the US, the Republic of Korea, the Russian Federation and Japan recommended deleting the entire recommendation. This was opposed by the EU, who considered it an “important sign of political commitment” and recalled that the Working Group is mandated to reach conclusions on feasibility.

NON-PARTIES TO UNCLOS: The G-77/China suggested additional text, in which future negotiations “will not prejudice the accession to UNCLOS by states non-party to it.” Venezuela, noting that although the G-77/China is “a big family,” the position on states non-party to UNCLOS is delicate, and recalling her national delegation’s reservations to the parts of the Rio+20 outcome document related to BBNJ, proposed alternative text on “ensuring that the recommendation on a binding instrument and the resulting negotiations be open to all states, particularly states non-party to UNCLOS, without implying the acceptance of any legal obligation from instruments that have not been explicitly accepted by these states.” Co-Chair Lijnzaad noted that this matter has already been addressed under the UN Fish Stocks Agreement. The EU said that a future, third implementing agreement under UNCLOS should be open to states non-party to UNCLOS. In the afternoon, the G-77/China offered text on “recognizing that neither the participation in the negotiations nor their outcome may affect the legal status of non-parties vis-à-vis UNCLOS and/or any other related agreement or instrument they are not party to.” Venezuela withdrew her proposal.

FORMAT AND TIMELINES OF A FUTURE PROCESS: The G-77/China tabled a proposal “to convene, under UN auspices, an intergovernmental conference on BBNJ to elaborate a legally binding instrument under UNCLOS,” whereby:

- a PrepCom—open to all UN member states, members of specialized agencies, parties and non-parties to UNCLOS, and

UN observers—prepares for, and makes recommendations to the conference on the elements to be included in the agreement, as well as provisional rules of procedure, taking into account the views expressed in the Co-Chairs' reports and compilation of submissions to the Working Group, with the Group being terminated;

- the precise mandate, rules of procedure and calendar of meetings of the PrepCom will be established by the General Assembly, with the PrepCom starting its work in 2016; and
- the Assembly will decide, before the end of its seventy-first session, on the specific date of the intergovernmental conference and a timeline for the negotiations taking into account progress reports from the PrepCom.

The G-77/China then proposed deleting text on the need for the negotiations to comply with “minimum and non-exclusive elements,” arguing that this list has not been agreed upon and that the PrepCom would discuss them. These elements include: recognizing, respecting and complementing the existing legal framework and the competence and mandates of existing global and regional organizations; fully regarding the applicable principles of international law of the sea identified under UNCLOS and other international instruments; a pragmatic approach to negotiations; and including modern governance principles.

Iceland, New Zealand, Mexico, Japan, the Russian Federation, Canada, Australia and the Republic of Korea expressed concern over the proposed deletion, particularly of text calling for recognizing, respecting and complementing the existing legal framework and the competence and mandates of existing global and regional organizations. New Zealand, supported by Mexico, Canada, Australia, the Republic of Korea and the Russian Federation, proposed alternative text to “affirm the need to recognize and respect the existing legal frameworks and the competence and mandates of global and regional bodies,” with Japan adding that the negotiations also do “not undermine” existing legal frameworks. Switzerland recommended also referring to the CBD, including the Nagoya Protocol, and UNEP. The Republic of Korea suggested adding FAO. Argentina noted “the PrepCom may need to refer differently to existing regional and sectoral organizations.” The Russian Federation suggested tasking the PrepCom with deciding which issues should be dealt with under a new instrument and which under existing instruments.

DISCUSSION AND ADOPTION OF RECOMMENDATIONS

This item was considered on Thursday evening in plenary, by an informal group throughout Friday and into Saturday morning, and in plenary on early Saturday morning.

On Thursday evening, delegates considered a heavily bracketed working document, representing the views discussed in the Co-Facilitators' draft, agreeing to reaffirm the “commitment in paragraph 162 of the Rio+20 outcome document.” The G-77/China, supported by the EU and Mexico, agreed to welcome the “exchange of views” on the scope, parameters and feasibility of an international instrument under UNCLOS and “the progress made” within the Working Group. Delegates also retained text regarding the development of an international instrument under UNCLOS. The G-77/China, opposed by Canada, Iceland, Japan and the US, insisted on retaining reference to “the legal gap” as

the reason for a new implementing agreement. Norway proposed alternative text on the need to address “any legal gaps” and for a new implementing agreement.

The EU recommended that the General Assembly “decide that the negotiations shall address the elements” of the 2011 package. The Russian Federation argued that, as endorsed by the General Assembly, the package includes not only subject-matter elements but also a process to identify ways forward including through the implementation of existing instruments. Argentina, supported by the EU, objected that the package only refers to subject-matter elements “together and as a whole,” whereas the process foreseen in 2011 has been superseded by Rio+20. The Russian Federation reiterated that without common understanding of gaps, a PrepCom should indicate which elements of the package can be included in a new instrument and which can be addressed through implementation of existing instruments.

Australia, supported by the EU, the Russian Federation, Iceland, Canada and Japan, but opposed by the G-77/China, proposed new text reflecting the need to “recognize, respect and not undermine UNCLOS and other relevant legal instruments and frameworks, and relevant global, regional and sectoral bodies and arrangements.” The EU, with Norway, proposed retaining reference to “fostering coordination and cooperation” between a new and existing instruments.

The US and the Russian Federation, opposed by the G-77/China, could not support convening an intergovernmental conference, but favored moving forward on “an international instrument” through a PrepCom. The EU restated its position on the need for a “legally binding” instrument under UNCLOS. New Zealand, with Norway, supported taking steps towards launching negotiations by convening a conference.

On Friday morning, Co-Chair Lijnzaad proposed, and delegates agreed, to task an informal group “representing all sides of the debate” to try and reach consensus on the remaining outstanding issues in the draft recommendations, including on the legal gaps, relationship with other agreements and bodies, and the format and timelines for a future process.

LEGAL GAPS: The informal group discussed a new proposal by a large coordinating group, which conceded to exclude all references to legal gaps and the inability to maintain the status quo, but stressed the need for a comprehensive global regime relating to the conservation and sustainable use of BBNJ under UNCLOS. Some delegations expressed reservations on including the text at all, with one deeming any reference to “the need for a comprehensive regime on BBNJ” too political. Those delegates “unconvinced” of the necessity of this recommendation noted that the text aimed to clarify the reason why states want to start a negotiating process, arguing that different delegations have different reasons for this and stating that they were not prepared to attempt to find consensus on this at such a late stage. One group registered concern that deleting the paragraph would undermine their position. One delegation proposed text to resolve the impasse, stressing “the importance of a comprehensive global regime” on the conservation and sustainable use of BBNJ, with another preferring to stress the importance of “global norms or regimes” relating to BBNJ. After consultations late into the night, delegates eventually agreed to “stress the need for the comprehensive global regime” to “better address” the

conservation and sustainable use of BBNJ, “having considered the feasibility” of developing an international instrument under UNCLOS.

RELATIONSHIP WITH OTHER INSTRUMENTS: On the relationship between a new instrument on BBNJ, UNCLOS and other instruments, extensive discussions revolved around the working document’s text affirming the need to recognize, respect and not undermine UNCLOS and other relevant legal instruments and frameworks, and the possible implication that states non-party to various instruments would have to recognize, respect and not undermine instruments to which they are not party. Some delegates underscored the importance of text reflecting the existence of instruments, bodies and arrangements dealing with aspects of BBNJ, noting that referencing these would frame the landscape into which any new agreement on BBNJ would be inserted. There was strong opposition to a suggestion that “states” respect “UNCLOS and other relevant instruments,” with one delegation noting that the suggestion shifts the focus from acknowledging existing instruments on BBNJ. After regional consultations, many supported a new proposal to indicate that “the process” should not undermine “existing legal instruments.”

In a late night session, the informal group resumed discussions on the relationship with other instruments. One delegation preferred recognizing that neither the participation in these negotiations nor their outcome may affect the legal status not only of non-parties, but also of parties, “to UNCLOS or any other related agreements” vis-à-vis the convention and those agreements. After consultations, delegates eventually agreed to an amended formulation of this suggestion.

FUTURE PROCESS: On Friday afternoon, two delegations, one favoring a legally binding agreement and another that remained unconvinced, proposed compromise text recommending that the General Assembly decide: to “develop an international instrument” and to that end establish a PrepCom in 2016 “to make substantive recommendations” to the Assembly on “the elements to be included in a draft text of a legally-binding instrument;” and “decide on the convening of an intergovernmental conference” before the end of 2017. Unable to come to consensus on this proposal, delegates broke into regional consultations.

In the evening, the informal group continued to discuss the need to convene an intergovernmental conference, together with the role of a PrepCom, and the role of the General Assembly in this regard. A minority favored a more open-ended timeline for the PrepCom to consider substantive issues to be forwarded to the General Assembly, which would then decide on whether to convene an intergovernmental conference depending on the outcome of the PrepCom. A large number of delegations supported the PrepCom convening for a limited time and drafting text on the elements to be included in a legally binding agreement to be decided by the intergovernmental conference.

Delegates then considered another compromise proposal put forward by one of the “unconvinced” countries on establishing a PrepCom in 2016, to report its progress to the General Assembly “by the end of 2017,” which would “decide on the starting date of the intergovernmental conference or giving the PrepCom more time to fulfill its mandate.”

Late into the night, delegates reconvened in the informal group to reconsider the format and timelines for a future process. One “unconvinced” delegation, supported by two others, stressed that the intergovernmental conference’s start date is contingent on the outcome of the PrepCom, proposing consideration of a possible extension of the time allocated to the PrepCom. Another “unconvinced” delegation noted that the PrepCom would need to analyze scientific knowledge to inform its work, arguing that this could also call for an extension of the time allocated to the PrepCom, as science is still evolving. One group, opposed by one “unconvinced” delegation, stressed the need for the PrepCom to propose elements to be included in a legally binding instrument, instead of giving this mandate to the General Assembly.

Delegates then debated the mandates of the PrepCom and the intergovernmental conference. Some argued the mandate of an intergovernmental conference should be to consider the recommendations from the PrepCom and to elaborate the text of a legally binding treaty. Others cautioned against treating the PrepCom as a “stamping station” in charge of drafting “a complete treaty that the Conference will then accept or not.” Delegates eventually agreed on compromise text produced by a regional group, recommending that the General Assembly: “decide to develop a legally binding instrument”; establish a PrepCom, which will work from 2016 to 2017, in order to make “substantive recommendations” to the General Assembly on the “elements of a draft text” of a legally binding instrument; and before the end of its seventy-second session, decide “on the convening and on the starting date” of an intergovernmental conference “to consider the PrepCom’s recommendations and elaborate the text” of a legally binding instrument.

CLOSING PLENARY

Reconvening in a plenary session at 2:25 am on Saturday morning, delegates adopted the recommendations of the Working Group to the sixty-ninth session of the General Assembly. The G-77/China expressed satisfaction that the meeting could adopt a consensus recommendation on an international legally binding agreement, but expressed disappointment that convening an intergovernmental conference had not been agreed upon, cautioning that the PrepCom is only the beginning. He concluded, “while the road has been long, its destination might be on the horizon.”

Colombia reiterated his country’s commitment to the conservation and sustainable use of BBNJ, but underscored that support for consensus recommendations does not imply acceptance of UNCLOS provisions, to which his country is not a party. Venezuela also emphasized that her country is not party to UNCLOS, underscoring that her support for the consensus recommendations cannot be interpreted as a change in Venezuela’s position regarding UNCLOS.

The EU expressed hope that the recommendations will lead to a better regime for oceans and seas, noting that the Working Group is implicitly terminated and thanking the Co-Chairs for their efforts. Canada led delegates in applauding the Co-Chairs and the Secretariat for their support to the Working Group. Co-Chair Lijnzaad expressed appreciation for all the hard work done through informal consultations. Wishing delegates good

luck for the next stage of the process, Co-Chair Kohona closed the meeting at 2:45 am.

Recommendations: The Working Group recommends to the General Assembly that it, *inter alia*:

- reaffirm the commitment in paragraph 162 of the Rio+20 outcome document in which Heads of State and Government committed to address, on an urgent basis building on the work of the Working Group, the conservation and sustainable use of BBNJ, including by taking a decision on the development of an international instrument under UNCLOS before its sixty-ninth session;
- note its request to the Working Group to make recommendations on the scope, parameters and feasibility of an international instrument under UNCLOS;
- welcome the exchange of views on the scope, parameters and feasibility of an international instrument under UNCLOS and the progress made in the Working Group within its mandate established by resolution 66/231 and in light of resolution 66/78 to prepare for the decision on the development of an international instrument under UNCLOS to be taken by the General Assembly at its sixty-ninth session;
- stress the need for the comprehensive global regime to better address the conservation and sustainable use of BBNJ, having considered the feasibility of developing an international instrument under UNCLOS;
- decide to develop an international legally binding instrument on BBNJ under UNCLOS and to that end, prior to holding an intergovernmental conference, decide to establish a PrepCom to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument, taking into account the reports of the Co-Chairs on the work of the Working Group, with the PrepCom starting its work in 2016 and reporting by the end of 2017 its progress to the General Assembly;
- decide, before the end of its seventy-second session, and taking into account the PrepCom's report, on the convening and on the start date for an intergovernmental conference to consider the PrepCom's recommendations and elaborate the text of an international legally binding instrument under UNCLOS;
- decide the negotiations shall address the topics identified in the package agreed in 2011 on the conservation and sustainable use of BBNJ in particular, together and as a whole, MGRs, including benefit-sharing questions, measures such as area-based management tools, including MPAs, EIAs, capacity building and the transfer of marine technology;
- recognize that the process on the development of an international legally binding instrument should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies; and
- recognize that neither the participation in the negotiations, nor their outcome, may affect the legal status of non-parties to UNCLOS or any related agreements with regard to those instruments, or the legal status of parties to UNCLOS or any related agreements with regard to those instruments.

A BRIEF ANALYSIS OF THE MEETING

The Working Group is terminated! Long live the PrepCom...?

As the Working Group on Marine Biodiversity in Areas beyond National Jurisdiction wrapped up its last set of recommendations to the General Assembly, following a decade of debates, delegates leaving the UN in the midst of a snow storm that hit New York in the early hours of Saturday were excited about consensus on starting negotiations on a new “legally binding instrument under UNCLOS,” by convening a preparatory committee (PrepCom) in 2017. At the same time, however, they could not help but wonder: “Is a PrepCom a step-change in the process or still the Working Group under another name”?

This brief analysis assesses progress made over the last three meetings, which represented an acceleration and intensification of international efforts towards preventing an impending mass extinction in the deep sea. The analysis first assesses substantive progress made by the Working Group in fleshing out options and elaborating on the scope, parameters and feasibility of a new international instrument, to which states committed to at the 2012 UN Conference on Sustainable Development. The analysis then turns to procedural progress achieved by the latest meeting of the Working Group in hammering out the aims, format and timelines of the next steps towards an international instrument. It then concludes with a reflection on the legacy of the Working Group—the lessons learned that may still come in handy going forward.

FLESHING OUT THE PACKAGE

The Working Group met twice in 2014 and, to everybody's satisfaction, engaged for the first time in substantive, interactive discussions around most of the issues comprised in the “package”—the consensus milestone reached by the Group in 2011 that spelled out the elements to be addressed to conserve and sustainably use BBNJ, namely: “together and as a whole, MGRs, including questions on benefit-sharing, measures such as area-based management tools, including MPAs, EIAs, capacity building and the transfer of marine technology.” By focusing on scope and parameters of a new international instrument, delegations finally fleshed out their well-rehearsed positions by putting forward possible options for MGRs, MPAs and EIAs.

With regard to benefit-sharing from MGRs, delegates identified options including: creating a brand-new international body to monitor—if not regulate—MGR uses; expanding the mandate of the international body already in charge of the common heritage regime for mining in the seabed, the International Seabed Authority; or subjecting access to MGRs to notification or authorization, based on flag state jurisdiction. Many also found it useful to differentiate monetary from non-monetary benefit-sharing, with a view to also contributing to other elements of the package: benefit-sharing in the form of collaboration in scientific research and development, for instance, could contribute to capacity building and technology transfer.

As highlighted by the US, however, several difficult questions remain unanswered: could a fish be considered a marine genetic resource? Who in the very long chain from basic research to

product sales would be required to share benefits: the end user, the state of the end user, the seller, the state of the seller? And to whom would any benefits go and on what basis would they be distributed?

More detailed ideas were also shared on conservation and management tools. For instance, a new instrument could provide procedures for identifying, designating and even managing new multi-purpose MPAs at the global level, or at least for recognizing existing regional or sectoral MPAs; it could provide monitoring and surveillance; or more modestly, set criteria and guidelines to help existing bodies to do all this. On EIAs, a new instrument could: establish common procedures and standards for assessment, monitoring, reporting and management of assessment results, leading to the development of a central information-sharing mechanism; create a framework for EIAs to be made public and subject to review by the international community; or, more modestly, produce recommendations and develop capacity for conducting and reviewing EIAs.

Innovative ideas also emerged in preparation for BBNJ-9, such as benefit-sharing from traditional knowledge on BBNJ, or a contingency fund for harmful effects of pollution on BBNJ. These ideas were put forward in the last batch of state submissions and included in the Co-Chairs' non-paper shared with national delegations in December 2014. But in the end, none of the earlier or latest substantive options were discussed at the meeting, as delegates preferred to concentrate on a succinct text to increase the chances of reaching consensus. As a result, the recommendations transmitted to the General Assembly only contain a reiteration of the 2011 package and a hint that the PrepCom, by taking up the Co-Chairs' reports of past meetings, will be able to build upon substantive advances in the Working Group's discussions.

Throughout these exchanges, however, delegates started to show some flexibility in their views that had previously seemed fixed and polarized. Some members of the G-77/China pointed to the need for a "pragmatic" rather than principled approach to MGRs, while a couple of others occasionally expressed unease at the possible implications on high-seas freedoms of a new instrument on BBNJ. Norway became a supporter of a new instrument; and Iceland accepted a new instrument as long as it excludes fisheries from its scope. Nonetheless a group of key oceans players "remained to be convinced" of the need for a new instrument: Canada, Japan, the Republic of Korea, the Russian Federation and the US.

PROGRESS ON SCOPE, PARAMETERS AND FEASIBILITY?

Against this background, the question of the scope of a new international instrument could have been seen as a no-brainer: an instrument open to all UN members (to also allow participation of non-parties to UNCLOS), applying to the two areas beyond national jurisdiction (high seas and the Area) and covering all the issues included in the 2011 package. On the other hand, the very notion of marine biodiversity is much broader and economically pervasive than that of the two existing implementing agreements under UNCLOS (seabed mining, and straddling and migratory fish stocks), which still have been extremely complex to negotiate and implement. Another difficulty identified by the Russian Federation, Iceland and Japan was: do all elements

of the package need to be addressed through a legally binding instrument? This brought delegations back to debates that marked BBNJ-2 in 2008 on the existence of regulatory or implementation gaps in the current international landscape—something that kept BBNJ-9 delegates negotiating even after consensus had been reached on other key recommendations. In the end, the final text stressed the need for a "comprehensive" global regime to "better address" conservation and sustainable use of BBNJ.

As to parameters, the crucial one that emerged and appeared to weigh significantly on the question of feasibility was the possible relationship between a new instrument and the complex plethora of global (but sectoral) or regional (but patchwork) instruments, bodies and arrangements that are already in place. Although the supporters of a new legally binding agreement have gone to great lengths to assure that a new agreement can enhance coordination and cooperation without stepping on any other process's toes, governments that "remain unconvinced" (but also others such as New Zealand, Australia and Norway) were keen to insert in the recommendation reassurances to this end. Once again, this issue kept delegates up very late until consensus was reached on "not undermining" existing instruments and bodies and not "affecting the legal status" of parties and non-parties.

Even with that assurance, however, as Canada repeatedly remarked over the past year, supporters of a new legally binding instrument had been unable to prove unequivocally the "value added" of a new instrument to those still unconvinced. NGOs tried to make it clear that a new implementing agreement would inject a greener, more modern governance dynamic into the law of the sea, particularly with stakeholders engaging in periodic Conferences of Parties similar to those under other multilateral environmental agreements. Some suggest that this could provide the missing global accountability framework for identifying cumulative impacts, good practices, missed opportunities for synergies, or weak links across disparate regimes, as well as putting pressure on states lagging behind in implementation. But detractors argued that most of this could be done by the General Assembly, whereas a new, heavier and more intrusive machinery could backfire and push away key ocean players that would never become a party to a new agreement. The fundamental question of feasibility, therefore, at least in the eyes of a minority, has not quite been answered by the Working Group. According to the recommendations going to the General Assembly, the Group has "considered" feasibility but not necessarily come to a definitive answer to it.

PROCEDURAL BABYSTEPS FORWARD

So what next? Already in 2011 the Working Group had recommended to "initiate a process on the legal framework" on BBNJ and at Rio+20 in 2012 states made a commitment on "taking a decision on the development of an international instrument under UNCLOS" on BBNJ. This time, the vast majority of countries arrived in New York determined that the Working Group would recommend in no uncertain terms the launch of a formal negotiating process towards a "third implementing agreement to UNCLOS" or at least commit to a legally binding outcome. Bearing all this in mind, and further bolstered by recent alarming media reports on impending, but still avoidable, mass extinctions in the oceans, NGOs and like-

mindful states were also hoping to fix precise timelines, with an intergovernmental conference convening in 2017.

While the “unconvinced” supported a PrepCom as a way to deepen discussions on any legal gaps that needed filling through a legally binding instrument, they adamantly resisted a decision to convene an intergovernmental conference without evidence that a PrepCom would bring definitive answers to the questions that have haunted the process since its inception in 2006. As the Russian Federation put it, “we should be result-bound and not time-bound.” Some observers feared that this reluctance was nothing more than a tactic to indefinitely delay “real” negotiations, while others opined that countries would not truly invest in developing their negotiating positions on the unprecedented and challenging elements of the package until there is a guarantee that the process is really heading somewhere. “We certainly do not want any more meetings of the Working Group or a Working Group-plus,” one seasoned observer affirmed.

The hardest negotiations at BBNJ-9 thus concentrated on what a PrepCom would do and “if or when” an intergovernmental conference should convene. Options for the PrepCom ranged from preparing rules of procedure and a structure for the negotiations of a new agreement by an intergovernmental conference, to negotiating a text that would just be rubber-stamped by the conference. In the end consensus was hard won on a two-year PrepCom process (2016-2017) identifying the “elements of a draft text of an international legally binding instrument under UNCLOS.” As a result, many were disappointed that eventually the General Assembly will still have to decide in 2018 whether or not to convene an intergovernmental conference to elaborate the text, depending on progress in the PrepCom. On the bright side, however, another major consensus milestone has been achieved: for the first time, all agreed on the legally binding nature of the new instrument to be developed under UNCLOS.

LEGACY

Numbed by exhaustion but moderately euphoric, delegates exiting the UN Headquarters early on Saturday morning could not quite picture the scenario in which they will meet again. Some wondered whether new Co-Chairs could inject fresh energy in the discussions, noting that in the corridors, certain participants had expressed disappointment at the initial Co-Chairs’ non-paper put together to facilitate work this week. NGOs, in turn, hoped that the next stages in the process will be as transparent as possible. Many had expressed concern that textual negotiations would be closed to IGOs and NGOs, as had occurred at BBNJ-5 and 6 with little, if any, open procedural discussion and sometimes even without updates to those excluded from the negotiations. Instead, both the exchange of views at BBNJ-7, 8 and 9 and, more significantly, the final crunch of informal negotiations at BBNJ-9 were open. Observers’ discreet and convivial presence in or near the negotiating room undoubtedly did not adversely affect consensus-building dynamics. And, as Canada indicated, technical and scientific input from international organizations, civil society and industry will be needed more and more in the formalized stages of the negotiations that lie ahead.

Many also expect that new country groupings will also emerge in the PrepCom. This is particularly the case with G-77/China, which kept disappearing “for 5 minutes” (which usually turned into an hour) to consult throughout the last day of negotiations. While the effort of keeping the large negotiating group of developing countries together throughout the week was admittedly laudable, it is clear to many veterans that there are three fault lines in the group: those who support a new legally binding agreement, such as the African Group and AOSIS; less convinced members in Asia; and the distinct interests in Latin America, due to some countries not being party to UNCLOS. As the process shifts into formal-negotiation mode, other regional groups may also show some cracks, as a new legally binding agreement will likely affect a whole range of activities in the oceans in which some have greater stakes than others.

Against this changing landscape and the risk that the PrepCom may spiral back to the intractable political questions of whether there are gaps in the current international legal framework or shortcomings in the implementation of existing regimes, the ultimate legacy of the Working Group is probably that the road towards consensus on a new treaty is only going to get rockier and that persuasive and creative solutions need to be urgently developed across regions to prevent the disappearance of life in the oceans.

UPCOMING MEETINGS

Global Conference on Inland Fisheries, Freshwater, Fish and the Future: This global conference will focus on “Freshwater, Fish and the Future: Cross-Sectoral Approaches to Sustain Livelihoods, Food Security and Aquatic Resources.” The conference will address four themes: biological assessment; economic and social assessment; drivers and synergies; and policy and governance. The meeting is expected to result in recommendations for inland fisheries policy statements. **dates:** 26-28 January 2015 **location:** FAO headquarters, Rome, Italy **contact:** Devin Bartley, FAO **email:** devin.bartley@fao.org **www:** <http://inlandfisheries.org/>

Workshop on Linking Global and Regional Levels in the Management of Marine ABNJ: This workshop aims to foster a dialogue on enhancing ecosystem approaches to the management of ABNJ through global, regional and national processes. The workshop will also share lessons learned and emerging trends in development, management and research on ABNJ from around the world and establish cross-sectoral linkages for improved information sharing on ABNJ. **dates:** 17-20 February 2015 **location:** FAO headquarters, Rome, Italy **contact:** Miriam Balgos or Marco Boccia **email:** miriambalgos@globaloceans.org or Marco.Boccia@fao.org **www:** <http://www.commonoceans.org/calendar/calendar-detail/en/c/267378/>

Sustainable Ocean Initiative Capacity-Building Workshop for South America: Participants at the Sustainable Ocean Initiative Capacity-Building Workshop, convened by the CBD Secretariat, the Ministry of Environment of Peru and FAO, will discuss scientific and technical tools to support the Aichi Biodiversity Targets, including the description of EBSAs. **dates:** 23-27 February 2015 **location:** Lima, Peru **contact:** CBD Secretariat **phone:** +1-514-288-2220

fax: +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/notifications/2014/ntf-2014-122-soi-en.pdf>

Eleventh Round of Informal Consultations of States

Parties to the UN Fish Stocks Agreement: The eleventh Round of Informal Consultations of States Parties to the United Nations Fish Stocks Agreement will be held in March. **dates:** 16-17 March 2015 **location:** UN Headquarters, New York **contact:** UN Division for Ocean Affairs and the Law of the Sea **email:** doalos@un.org **www:** <http://www.un.org/Depts/los/>

Tenure and Fishing Rights 2015 (User Rights): This global conference on tenure and fishing rights, hosted by FAO and the Ministry of Agriculture, Forestry and Fisheries of Cambodia, will focus on rights-based approaches for fisheries. **dates:** 23-27 March 2015 **location:** Siem Reap, Cambodia **contact:** Rebecca Metzner **email:** Rebecca.Metzner@FAO.org **www:** <http://www.userrights2015.com/>

Sixteenth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea:

The Informal Consultative Process will focus its discussions at its sixteenth meeting on “Oceans and sustainable development: integration of the three dimensions of sustainable development, namely, environmental, social and economic.” **dates:** 6-10 April 2015 **location:** UN Headquarters, New York **contact:** UN Division for Ocean Affairs and the Law of the Sea **email:** doalos@un.org **www:** <http://www.un.org/Depts/los/>

Eighteenth Session of the GCOS/GOOS/WCRP Ocean Observations Panel for Climate:

The eighteenth session of the Ocean Observations Panel for Climate (OOPC) of the Global Climate Observing System (GCOS), the Global Ocean Observing System (GOOS) and the World Climate Research Programme (WCRP) will take place in April. **dates:** 14-17 April 2015 **location:** Sendai, Japan **contact:** GCOS Secretariat **phone:** +41-227-308-067 **fax:** +41-227-308-052 **email:** GCOSJPO@wmo.int **www:** http://ioc-unesco.org/index.php?option=com_oe&task=viewEventRecord&eventID=1496

CBD Regional Workshop on EBSAs in the North-West Indian Ocean and Adjacent Gulf Areas:

The CBD Secretariat is convening this regional workshop to facilitate the description of EBSAs in the North-West Indian Ocean and Adjacent Gulf Areas. The workshop will be hosted by the Ministry of Environment and Water of the United Arab Emirates and is being convened in collaboration with UNEP Regional Office for West Asia and the CMS Office - Abu Dhabi, among others. **dates:** 19-25 April 2015 **location:** Dubai, United Arab Emirates **contact:** CBD Secretariat **phone:** +1-514-288-2220 **fax:** +1-514-288-6588 **email:** secretariat@cbd.int **www:** <http://www.cbd.int/doc/notifications/2014/ntf-2014-129-eb-sa-en.pdf>

Sixty-Eighth Session of the IMO Marine Environment Protection Committee:

The Marine Environment Protection Committee of the International Maritime Organization (IMO) will hold its sixty-eighth session in May. **dates:** 11-15 May 2015 **location:** London, UK **contact:** IMO Secretariat **phone:** +44-20-7735-7611 **fax:** +44-20-7587-3210 **email:** info@imo.org **www:** <http://www.imo.org/MediaCentre/MeetingSummaries/Pages/Default.aspx>

Second Blue Planet Symposium: This symposium will aim to “bring ocean observations to users.” It will coordinate ocean-related tasks within the Group on Earth Observations;

discuss implementation of ocean observation systems; and raise awareness of the societal benefits of ocean observations to the broader community, particularly donors and policymakers. It will include a particular focus on observations in the Asia-Pacific region, linking observations to societal benefits, such as for small island developing states and coastal environments and the blue economy. **dates:** 27-29 May 2015 **location:** Cairns, Australia **email:** info@blueplanetsymposium.com **www:** <http://www.blueplanetsymposium.com/>

CITES AC28: The twenty-eighth meeting of the Animals Committee of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES AC28) will convene in Tel Aviv, Israel, in order to develop recommendations for the seventeenth Conference of the Parties to CITES.

dates: 30 August-3 September 2015 **location:** Tel Aviv, Israel **contact:** CITES Secretariat **phone:** +41-22-917-81-39/40 **fax:** +41-22-797-34-17 **email:** info@cites.org **www:** <http://cites.org/eng/com/ac/index.php> and <http://cites.org/eng/news/calendar.php>

Seventieth Session of the UN General Assembly: The seventieth session of the UN General Assembly is scheduled to open at UN Headquarters on 15 September 2015. The General Debate is scheduled to open on 22 September 2015. **dates:** 15-28 September 2015 **location:** UN Headquarters, New York **www:** http://www.un.org/ga/search/view_doc.asp?symbol=A/INF/67/1

UN Summit on the Post-2015 Development Agenda: The summit is expected to adopt the post-2015 development agenda, including: a declaration; a set of Sustainable Development Goals, targets, and indicators; their means of implementation and a new Global Partnership for Development; and a framework for follow-up and review of implementation. **dates:** 25-27 September 2015 **location:** UN Headquarters, New York **contact:** UN Division for Sustainable Development **fax:** +1-212-963-4260 **email:** dsd@un.org **www:** <https://sustainabledevelopment.un.org/post2015/summit> and <http://www.un.org/millenniumgoals/beyond2015-news.shtml>

For additional meetings, see <http://biodiversity-1.iisd.org/>

GLOSSARY

ABNJ	Areas beyond national jurisdiction
ABS	Access and benefit-sharing
AOSIS	Alliance of Small Island Developing States
BBNJ	Marine biodiversity in areas beyond national jurisdiction
CBD	Convention on Biological Diversity
EBSAs	Ecologically or biologically significant marine areas
EIA	Environmental impact assessment
FAO	Food and Agriculture Organization of the UN
IPRs	Intellectual property rights
MGRs	Marine genetic resources
MPAs	Marine protected areas
MSR	Marine scientific research
PrepCom	Preparatory Committee
Rio+20	UN Conference on Sustainable Development
UNCLOS	UN Convention on the Law of the Sea
UNEP	UN Environment Programme