



## 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.