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PrepCom 2

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PREPCOM 2 HIGHLIGHTS: THURSDAY, 8 SEPTEMBER 2016

On Thursday, 8 September, the informal working group on cross-cutting issues, facilitated by Chair Charles, met throughout the day.

INFORMAL WORKING GROUP ON CROSS-CUTTING ISSUES

PRINCIPLES: ARGENTINA highlighted, supported by NORWAY, the importance of respecting the balance of established obligations under UNCLOS, and referenced the need not to transfer disproportionate burdens to developing states in the Port State Measures Agreement. Noting the importance of respecting established UNCLOS principles, PARAGUAY highlighted the rights of LLDCs.

JAPAN, supported by the US, favored the science-based, ecosystem and precautionary approaches; and requested further discussions on adjacency and the polluter pays principle. ICELAND supported non-duplication, coastal states' sovereign rights and high seas freedoms. AUSTRALIA stressed: supported by NORWAY, the importance of precise terminology; and the inclusion of a commitment not to undermine existing instruments. NEW ZEALAND, with the RUSSIAN FEDERATION, called for further discussions on the applicability of the principles. The US, supported by NORWAY, prioritized discussing how each principle will be used in the ILBI.

IUCN suggested including the common concern of humankind, as enshrined in the CBD, explaining that it entails stewardship, collaboration, partnership, inter- and intra-generational equity, solidarity, accountability, and benefit- and burden-sharing through cooperation, which are all compatible with UNCLOS.

GREENPEACE and the HIGH SEAS ALLIANCE recommended including principles in a stand-alone article, similar to UNFSA, pointing to the principles of: protection and restoration of the health, productivity and resilience of oceans and marine ecosystems, and maintenance of BBNJ; sustainable and equitable use of marine life for the benefit of present and future generations; and cooperation between and among states to achieve the ILBI purposes.

Common heritage/high seas freedoms: BANGLADESH argued for applying the common heritage principle to MGRs on the seafloor, noting that the Area itself is common heritage and that the principle is also built into the outer continental shelf regime, expressing openness to discussing the regime for MGRs floating in the high seas. INDIA supported including the common heritage principle, high seas freedoms, ABS, science-based approach, transparency and participation. The REPUBLIC OF KOREA, with the US, noted lack of agreement on the

applicability of the common heritage principle. Stating that her country cannot accept the common heritage principle in the ILBI, the RUSSIAN FEDERATION recommended including high seas freedoms and, with MOROCCO, respect for the rights and interests of coastal states over the continental shelf. MOROCCO also suggested referring to international cooperation and capacity building for developing countries, including African ones. JAPAN, with the US, underscored high seas freedom and requested further discussions on the common heritage principle and on "equitable" benefit-sharing, noting that the kind of benefit-sharing under the ILBI is still under discussion. BANGLADESH pointed to the common heritage principle under UNCLOS Article 82 (payments and contributions from the outer continental shelf exploitation), calling for the ILBI to adapt it to MGRs.

Common but differentiated responsibilities: JAPAN, with the US, requested further discussion of the common but differentiated responsibilities principle, underscoring that it is not incorporated in the CBD, UNCLOS and the UNFSA, and is inappropriate for the ILBI. ALGERIA emphasized the link between common but differentiated responsibilities and climate impacts on the high seas. ECUADOR favored including common but differentiated responsibilities, with ERITREA referring to the Rio Declaration on Environment and Development, and its relevance to BBNJ with regard to developing states' special needs.

SCOPE: Many called for the ILBI to be open to all. Emphasizing the need for universal participation, the G-77/CHINA recommended including UNCLOS non-parties, with the AFRICAN GROUP cautioning against crafting a "watered down" agreement to accommodate a large number of states. IRAN proposed including provisions incentivizing participation and ratification, drawing from UNFSA Articles 17 (non-members and non-participants) and 23 (port-state measures). The EU supported drawing from UNFSA for inspiration on UNCLOS non-parties, and moving towards enhancing coherence. JAPAN cautioned against creating disincentives for MSR, noting its benefits to humankind and implications for ensuring wide membership. Emphasizing the need to address the geographical scope of the ILBI, the AFRICAN GROUP, with CARICOM and MEXICO, cautioned against obstructing progress by focusing on a long list of definitions.

DEFINITIONS: The G-77/CHINA stressed the need to define ABNJ, MGRs and MGR utilization. Cautioning against redefining UNCLOS definitions, the EU acknowledged the need to define technical terms, like ABMTs, MPAs and MGRs, inspired by those found in existing instruments to ensure consistency. IRAN urged distinguishing coherence with universal instruments and taking inspiration from regional instruments.

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CANADA called for definitions compatible with UNCLOS and related instruments. COSTA RICA drew attention to her written submission, which compiles definitions from different instruments and adapts them to the ILBI. CARICOM pointed to, as sources of useful guidance, the Port State Measures Agreement, CBD, UNCLOS and the Espoo Convention.

RELATIONSHIPS: With UNCLOS: The G-77/CHINA, the EU and others highlighted that the ILBI shall not undermine UNCLOS rights and obligations. CARICOM, with the EU, JAPAN, the US, CANADA, ARGENTINA and others, considered UNFSA Article 4 (relationship with UNCLOS) as a possible model. INDIA said the ILBI should fill legal and implementation gaps, especially on MGRs. ARGENTINA noted that the relationship with UNCLOS could be addressed in the ILBI objective, inspired by UNFSA Article 2 (objective). AUSTRALIA, supported by CANADA, stressed that as an implementing agreement, the ILBI should assist parties in implementing UNCLOS obligations.

With other agreements: NORWAY noted that the meaning of “not undermining” other agreements has not been agreed upon, and UNFSA Article 44(1) on the relationship with other agreements could be a possible model; and underscored the possibility of stipulating what the ILBI will not do, such as direct management. CHINA highlighted that the ILBI should: not interfere with the mandate of FAO, RFMOs, IMO and ISA; promote coordination and cooperation; and avoid duplication or overlap with existing mandates. NEW ZEALAND underscored the need to: supported by the US, build upon BBNJ expertise in regional and sectoral organizations; and improve the current framework by creating incentives for enhanced performance through global guidance and standards, pointing to UNFSA Article 8(6) on consultation with RFMOs as a model. JAPAN cautioned against giving the ILBI authority to intervene in existing frameworks. The US stressed the need to secure relationships with existing organizations and to establish new bodies where necessary. AUSTRALIA cautioned against weakening the role of existing regional and sectoral bodies. CANADA highlighted that the relationship between the ILBI and other instruments will help ensure universal participation. ICELAND underlined that the PrepCom is not a venue to renegotiate existing mechanisms.

COSTA RICA underlined that the ILBI should standardize criteria used by existing bodies and support their work without undermining them, cautioning against using terms not agreed upon in Resolution 69/292 such as non-interference or non-duplication. ARGENTINA noted that no existing instrument has BBNJ conservation and sustainable use as its core mandate, calling, supported by NRDC, for a global mechanism to address this gap through a comprehensive approach drawing upon existing bodies with expertise and jurisdiction over activities in ABNJ, particularly relating to ABMT establishment.

GREENPEACE and the HIGH SEAS ALLIANCE argued that “not undermining” under the UNFSA implies “not reducing the effectiveness of measures” adopted by existing bodies, thereby avoiding the lowest common denominator “trap,” without preventing the application of best practice.

INSTITUTIONAL ARRANGEMENTS: Several supported a scientific body, a secretariat and a decision-making body. CARICOM suggested establishing: a scientific and technical body, with ARGENTINA; a process for monitoring and review, including reporting requirements; a clearinghouse mechanism, supported by the FSM; an annual COP meeting at UN Headquarters; and a periodic review conference. NEPAL called for a global CB&TT funding mechanism under the ILBI. The FSM call for compliance, dispute resolution, and ABS mechanisms.

The EU highlighted the need for a decision-making body such as a COP, which could establish subsidiary organs like a scientific committee. AUSTRALIA favored light arrangements to support: sharing of data and science; visibility of capacity

building opportunities; improved coordination; discussions on the implementation at the relevant level of ILBI standards; and potentially sharing details on MGR access. NORWAY underscored possible mechanisms for information sharing, a clearinghouse for EIAs and measures taken, oversight or review of implementation, and compliance. CANADA favored: a COP or review conference; an avenue to ensure science is included in decision-making, noting that existing organizations can bring their measures to the ILBI decision-making body’s attention; and a compliance mechanism with public scrutiny. The US supported a decision-making structure, open to all and meeting every two years, modelled after the UNFSA review conference. JAPAN highlighted the importance of a decision-making forum and a scientific advisory forum on EIAs and MPAs. The RUSSIAN FEDERATION stated that scientific cooperation should be addressed by existing scientific committees under regional agreements.

BANGLADESH, opposed by JAPAN and the RUSSIAN FEDERATION, supported a cost-effective expansion of the ISA’s mandate. COSTA RICA suggested: a COP, a CB&TT mechanism, including a clearinghouse, a financial mechanism and a scientific and technical advisory body on ABMTs and EIA measures, which could be part of an organization running in parallel to the ISA; and a dispute-resolution mechanism. ALGERIA recalled that a report assessing, *inter alia*, the feasibility of expanding the ISA’s mandate is due in July 2017.

The RUSSIAN FEDERATION cautioned against a global mechanism governing MPAs. The NORTH PACIFIC FISHERIES COMMISSION highlighted existing expertise and cost-effectiveness, noting that RFMOs are evolving, and suggested filling gaps in capacities, capabilities and current mandates rather than adding another bureaucratic layer.

IUCN underscored: the benefits of a global mechanism, including consistency, international legitimacy, coordination and strength in numbers; a possible mechanism for enhancing capacities of existing bodies, highlighting the potential development of regional and sectoral biodiversity strategies and action plans and the importance of a global reporting mechanism; and the need for a common scientific basis. NRDC and the HIGH SEAS ALLIANCE called for, *inter alia*, a global scientific committee and a compliance committee.

RESPONSIBILITY AND LIABILITY: IUCN suggested, *inter alia*, that any ILBI state party and competent international organizations be entitled to invoke, also on behalf of the international community, the responsibility of any state that has breached its responsibilities to protect the marine environment; and all environmental damage should be subject to reparation.

IN THE CORRIDORS

On the penultimate day of PrepCom 2, delegates delved into discussions of cross-cutting issues, returning to key points already raised in the process. Many appeared to seize the opportunity to concretize positions on thorny issues, such as on equity in relation to benefit-sharing, or the possible inclusion of common but differentiated responsibility under the ILBI. Several also put their cards on the table as to what they understand by “not undermining” regional and sectoral organizations. Here, some elucidated their view that the ILBI should not engage in management directly or interfere with existing processes, while others defended the position that filling gaps and providing common standards would not duplicate or threaten the role of existing bodies, but actually ensure that the “effectiveness” of these bodies’ measures is not undermined. Looking ahead, a participant anticipated “a great deal of homework for the intersessional period, so as to move us from divergent paths onto a common one.”

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of PrepCom 2 will be available on Monday, 12 September 2016, online at: <http://www.iisd.ca/oceans/bbnj/prepcom2/>