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**SUMMARY OF THE FOURTH MEETING OF THE WORKING GROUP ON MARINE
BIODIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION**

31 MAY - 3 JUNE 2011

GLOSSARY

<i>ABNJ</i>	<i>Areas Beyond National Jurisdiction</i>
<i>ABS</i>	<i>Access and Benefit-Sharing</i>
<i>BBNJ</i>	<i>Marine biodiversity in areas beyond national jurisdiction</i>
<i>CBD</i>	<i>Convention on Biological Diversity</i>
<i>COP</i>	<i>Conference of the Parties</i>
<i>DOALOS</i>	<i>UN Division for Ocean Affairs and the Law of the Sea</i>
<i>EBSA</i>	<i>Ecologically and Biologically Significant Area</i>
<i>EIA</i>	<i>Environmental Impact Assessment</i>
<i>IPRs</i>	<i>Intellectual property rights</i>
<i>ISA</i>	<i>International Seabed Authority</i>
<i>ITPGR</i>	<i>International Treaty on Plant Genetic Resources for Food and Agriculture</i>
<i>MGRs</i>	<i>Marine genetic resources</i>
<i>MPAs</i>	<i>Marine Protected Areas</i>
<i>MSR</i>	<i>Marine scientific research</i>
<i>RFMOs</i>	<i>Regional Fisheries Management Organizations</i>
<i>Rio+20</i>	<i>United Nations Conference on Sustainable Development</i>
<i>SEA</i>	<i>Strategic Environmental Assessment</i>
<i>UNCLOS</i>	<i>United Nations Convention on the Law of the Sea</i>

The fourth 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 31 May - 3 June 2011, at UN Headquarters in New York. In accordance with General Assembly resolution 65/37 of 7 December 2010, the meeting examined:

- the scientific, technical, economic, legal, environmental, socio-economic and other aspects of the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, including activities of the United Nations and other relevant international organizations;
- possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction; and
- key issues and questions for more detailed background studies.

The meeting was mandated in particular to: continue discussions of the legal regime on marine genetic resources, as well as marine protected areas and environmental impact assessment processes in areas beyond national jurisdiction; and develop recommendations for submission to the General Assembly at its sixty-sixth session.

Approximately 200 participants representing governments, UN agencies, intergovernmental and non-governmental organizations attended the meeting. Following difficult negotiations, most of which occurred in an open-ended Friends of the Co-Chairs group, that was not open to observers, and in an even smaller group within that, the Working Group adopted by consensus a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea. The recommendations also include a “package” of issues to be addressed as a whole in this process, namely: marine genetic resources, including questions on benefits-sharing; measures such as area-based management tools, including marine protected areas and environmental impact assessments; capacity building and the transfer of marine technology. The consensus recommendations will be submitted to the 66th session of the General Assembly.

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MEETING REPORT

On Tuesday, 31 May, Co-Chair Liesbeth Lijnzaad (Netherlands) opened the meeting urging participants to agree on the way forward regarding conservation and sustainable use of BBNJ. Co-Chair Palitha Kohona (Sri Lanka) encouraged delegates to identify the areas and types of living resources to be discussed, and consider access, benefit-sharing and intellectual property rights (IPRs). Stephen Mathias, Assistant Secretary-General for Legal Affairs, delivered opening remarks on behalf of UN Legal Counsel Patricia O’Brien, recalling the “modest but nonetheless important” recommendations of the Working Group at its third meeting; stressing that the General Assembly is the only global forum with multidisciplinary and cross-sectoral competence to provide policy guidance on all issues related to BBNJ; and highlighting the importance of the Working Group’s recommendations for the 2012 United Nations Conference on Sustainable Development (Rio+20).

Co-Chair Lijnzaad introduced the provisional agenda (A/AC.276/L.5). Argentina, on behalf of the Group of 77 and China (G-77/China), proposed referring to: the legal regime on MGRs, MPAs and EIA processes together, rather than as separate items; and, opposed by the US and Iceland, discussion of possible options and approaches to “the legal regime,” rather than “international cooperation and coordination,” on BBNJ. Following a short suspension, the G-77/China offered compromise language on considering options and approaches “on all aspects under examination within the mandate of the Working Group, taking into account in particular section 10 of General Assembly resolution 65/37.” Delegates adopted the agenda as amended.

Co-Chair Lijnzaad introduced the draft format and annotated provisional agenda and organization of work (A/AC.267/L.6), noting that an open-ended Friends of the Co-Chairs group will assist in drafting recommendations for plenary consideration. Delegates adopted the document without amendment. During the afternoon plenary, Co-Chair Lijnzaad clarified that the Friends of the Co-Chairs group was open only to national delegations.

Delegates then delivered general statements and heard presentations by: Nii Allotey Odunton, Secretary-General of the International Seabed Authority (ISA), on the work of the Authority; Rama Rao, World Intellectual Property Organization (WIPO), on the functions of intellectual property and the role of WIPO; Lyle Glowka, CBD, on the Nagoya Protocol; and Harlan Cohen, International Union for Conservation of Nature (IUCN), on EIAs, MPAs and capacity building.

On Wednesday, plenary discussed various aspects of, and possible options and approaches for, the conservation and sustainable use of BBNJ, and on Thursday issues and questions requiring detailed background studies. The Friends of the Co-Chairs group met from Tuesday through Thursday, with a “small group of Friends” continuing discussions on Thursday evening and Friday afternoon. Plenary adopted the Working Group’s recommendations on Friday evening. This report summarizes the discussions on the three substantive issues on the agenda of the Working Group (MGRs, MPAs and EIA processes), the way forward, and the discussion of the Working Group’s draft recommendations.

DISCUSSION OF ASPECTS, OPTIONS AND APPROACHES

MARINE GENETIC RESOURCES: The European Union (EU) pointed to a gap in the current international legal and policy framework, calling for formalizing a negotiating process towards a new UNCLOS implementation agreement on access to and benefit-sharing (ABS) from MGRs, alongside MPAs and EIAs. The EU specified that a “first come first served” approach to MGR use undermines conservation; expressed willingness to discuss ways to control access to MGRs; and favored benefit-sharing, including monetary and non-monetary benefits such as those listed in the Annex to the Nagoya Protocol.

The G-77/China emphasized: the applicability of the common heritage principle to the biological resources of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (the Area); the relevance of the ISA for the protection of the marine environment and MSR; the need for a discussion of IPRs related to MGRs; and the proposal to initiate a negotiation process addressing holistically the legal regime on conservation, sustainable use, benefit-sharing, capacity building and technology transfer.

Mexico proposed that the implementation agreement elaborate a comprehensive approach to MGRs; and suggested focusing on the regulation of MGRs and the creation of a benefit-sharing mechanism, using as sources of inspiration the Nagoya Protocol and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR). Venezuela called for a transparent and inclusive framework clarifying states’ rights and responsibilities concerning the conservation and sustainable use of BBNJ, including ABS from MGRs. South Africa cautioned that in the absence of progress under the General Assembly, other fora may take action, pointing to the possible relevance of the Nagoya Protocol. Trinidad and Tobago called for the creation of a system to ensure developing country scientists participate in MSR in the Area.

Canada favored: discussing the regime applicable to MGRs in the high seas, separately from MGRs in the Area; promoting research while ensuring responsible collection and management of MGRs; welcoming efforts for developing codes of conduct for research activities; and adopting an approach balancing scientific freedom and marine conservation. The US and Japan stated that the freedom of the high seas apply to MGRs, with the US opposing a new legal regime on MGRs that would impede research and development. The US instead urged states to ensure compliance with existing regional and international agreements; and focusing discussions on MGRs on: conservation, potential criteria and guidelines for MSR, capacity building, and training opportunities. Iceland opposed a new implementation agreement, stressing the need to focus on practical measures to address implementation gaps. China and the Republic of Korea affirmed that the formulation and implementation of provisions on MGRs need to rely on MSR.

New Zealand underscored: convergence in the identification of inadequacies of the current international legal regime related to MGRs and the protection of marine biodiversity; fast developments in IPRs related to MGRs, with incomplete information on whether MGRs originate from BBNJ in granted patents and potential grounds for abuse; and the resulting need to elaborate guidelines, rules or mechanisms.

Australia prioritized the need for the Working Group to find constructive and consensus-based ways to move forward with the debate, and singled out the following elements of a consensus solution on MGRs: ensuring protection and conservation of MGRs; avoiding or carefully managing potential adverse impacts related to their exploitation; ensuring their sustainable development; exploring different options for the international community to develop fair and practical ways to share benefits while providing ample incentive for exploration and development; and allowing continued progress on MSR activities and technology diffusion. He also expressed willingness to explore all options regarding benefit-sharing, including ideas from the Nagoya Protocol or ITPGR, a combination of the two or other approaches based on technology transfer and capacity building; and proposed considering the possibility of immediate improvement of MGR management in ABNJ and immediate benefit-sharing through technology transfer, participation in research and sharing of scientific information.

IUCN called for a regime protecting the rights of all states, including those that have no capacity to access and utilize MGRs; and remarked that Rio+20 provides an opportunity to secure renewed commitment to address implementation gaps and address new challenges. Greenpeace noted that discussions on the two major themes of international environmental governance and the green economy at Rio+20 would help advance conservation of MGRs in ABNJ.

MARINE PROTECTED AREAS: The EU, supported by IUCN and Greenpeace, called for fulfilling the 2012 MPA target set by the World Summit on Sustainable Development, remarking that the gap between identification of ecologically and biologically significant areas (EBSA) and MPA designation in ABNJ stems from the absence of a global forum with such mandate; calling for formalizing a process towards an implementation agreement, including general principles of conservation and management and a package to enable, *inter alia*, a process for the global designation of MPAs. The Pew Environment Group urged putting forward recommendations to the General Assembly and Rio+20 on a focused negotiation mandate for an intergovernmental conference to address questions on MPA governance.

Mexico lamented the Working Group's slow progress on MPAs and called for providing a mandate for an intergovernmental conference to deal with MPAs and MGRs as a package and clarify the competent authority for the designation of MPAs and the management of benefit-sharing. The G-77/China urged the Working Group to make clear recommendations to the General Assembly for meaningful negotiations on all elements of the package at the same speed, considering conservation as one element, rather than placing specific emphasis on single tools such as MPAs. South Africa pointed to progress at the regional level, reiterating that a possible legal basis for global action on MPAs should be part of a package including benefit-sharing. Brazil noted the need for a legal basis to provide details on the establishment and management of MPAs. Chile stressed the need for guidelines on a common methodology on MPAs. The Republic of Korea, India and China stressed the need for science to underpin decisions on MPAs, with China adding the need to avoid prejudicing states' rights to assess resources in MPAs.

Canada favored: recognizing the responsibility of regional management bodies for selecting area-based management tools based on local conditions; discussing next steps in identifying EBSAs; and designating and implementing pilot sites to evaluate modalities for high seas MPAs. The US called on the General Assembly to encourage competent bodies to collaborate to protect EBSAs and share relevant information. Japan cautioned against a one-size-fits-all approach to MPAs. Norway stressed that action is still needed within areas under national jurisdiction, and prioritized increasing effectiveness of regional management bodies. The US encouraged progress by states and competent organizations in identifying and managing MPAs and cooperating on a case-by-case basis on potential cumulative impacts.

The Natural Resources Defense Council pointed to regional cooperation for high seas MPAs as a "cumbersome process" requiring agreement between benthic and pelagic Regional Fisheries Management

Organizations (RFMOs), the International Maritime Organization for shipping and the ISA for mining; and urged to fill the gap between EBSA identification and MPA designation.

ENVIRONMENTAL IMPACT ASSESSMENT: The EU, supported by IUCN, favored EIA and strategic environmental assessment (SEA) processes to prevent adverse effects including from new and emerging activities, noting a governance gap regarding EIAs in ABNJ. Canada called for: integrated, cross-sectoral cooperation at the regional level; more integrated scientific advice to underpin decisions, consistent with UNCLOS, CBD and the context of individual RFMOs; and sharing best practices and capacity building on EIA processes. China suggested that EIA guidelines consider the environmental diversity of marine areas and different capabilities of states, relying on MSR to formulate and implement provisions on EIA processes. The US encouraged using EIAs to understand activities that may cause significant harmful changes to the marine environment, and exchanging information about implementation of relevant UNCLOS obligations.

WAY FORWARD: New Zealand underscored: progress in the Working Group beyond ideological debates and clear willingness from all parties to engage in substantive discussions; convergence in the identification of inadequacies of the current international legal regime related to MGRs and the protection of marine biodiversity; and the resulting need to elaborate guidelines, rules or mechanisms.

Mexico emphasized the need to establish an intergovernmental committee, proposing that its mandate include elaborating a comprehensive approach to MGRs, MPAs, capacity building, technology transfer, and EIA processes. The EU called for formalizing a process towards an implementation agreement including: general principles of conservation and management; a process for the global designation of MPAs; a global approach to EIA and SEA; ABS from MGRs; and review of implementation and capacity building. Japan, the Russian Federation, Iceland and the US opposed developing an implementation agreement, with the US considering the Working Group an adequate forum to continue discussions.

Canada considered starting a negotiation process outside the Working Group premature, urging for a more focused agenda and more in-depth analysis preceding the next meeting of the Working Group on MPAs and MGRs. Norway noted that the option of an implementation agreement should be discussed if specific threats to the marine environment are identified as not being addressed by existing frameworks and needing a global response. Japan favored intersessional meetings to better identify issues and feasible options.

Australia, supported by Iceland, New Zealand, and Trinidad and Tobago, proposed one or two informal intersessional workshops before the next Working Group meeting to consider all options without prejudice to national positions, focusing on: benefit-sharing mechanisms and improved management of MGRs; and conservation and management tools, including MPAs and EIAs. New Zealand cautioned that workshops should not prevent progress. Australia stressed that workshops should facilitate “serious discussions” on all possibilities including a new UNCLOS implementation agreement and the potential for ABS from MGRs in ABNJ; and underscored the need for the Working Group to define how the workshops can contribute to building consensus on these issues. Trinidad and Tobago stressed the importance of obtaining the General Assembly’s endorsement of the workshops and the need for workshops to allow for the recognition of state contributions to the discussions and feed into the next meeting of the Working Group, rather than follow Chatham House Rules.

Canada drew delegates’ attention to a non-paper containing their proposals on intersessional processes to inform the Working Group, outlining issues for further study. The Russian Federation welcomed Canada’s non-paper as it highlighted a number of issues requiring in-depth analysis. Argentina expressed concern at Canada’s non-paper, questioning that several policy issues currently on the Working Group’s

agenda were proposed for discussion by experts in workshops, including: legal and policy instruments for the conservation and sustainable use of BBNJ, work on identification of EBSAs in ABNJ, the conduct of EIA, and the categorization of bioprospecting.

DISCUSSION OF THE DRAFT RECOMMENDATIONS

On Friday morning, Co-Chair Lijnzaad reported on progress in the Friends of the Co-Chairs group, noting that a smaller group of Friends continued discussions of draft recommendations in the evening. She explained that the “small group of Friends” had produced a revised set of draft recommendations, which could not yet be circulated in light of difficulties expressed by some delegations on the section on the legal framework on BBNJ.

The G-77/China expressed support for the draft produced by the “small group of Friends.” The US expressed difficulty with reference to an implementation agreement as a possible outcome. Iceland explained that the draft recommendations were based on a proposal by New Zealand, and proposed, supported by Canada, to reconvene the “small group of Friends” to complete discussions. The EU and the G-77/China suggested continuing discussions in plenary, with Argentina requesting circulation of the draft produced by the “small group of Friends.” The EU suggested circulating a new text as a possible basis for finding compromise.

Following a brief suspension to allow the Co-Chairs to hold informal consultations with the “small group of Friends” on the way forward, Co-Chair Lijnzaad announced the circulation of three proposals for discussion:

- the draft produced by the small group of Friends on Thursday evening;
- a proposal put forward jointly by the G-77/China, the EU and Mexico, making reference to a process on the legal framework to address “as a single undertaking” MGRs, including benefit-sharing, conservation measures such as area-based management tools, including MPAs and EIAs, capacity building and the transfer of marine technology; and
- a proposal by the US referring to the “possible development of a new international agreement building on the framework established by UNCLOS,” rather than “the possible development of an UNCLOS implementation agreement.”

The G-77/China emphasized that the joint proposal with the EU and Mexico represented compromise in accepting reference to the “possible development” of an UNCLOS implementation agreement, and argued that the US proposal could imply a different type of outcome. She stated that it would be unacceptable to the G-77/China and unfair to the overwhelming majority of delegations to compromise for less than the “mere possibility” of an implementation agreement.

The US emphasized that they would be open to signal the possibility for the Working Group to continue discussing new “instruments,” objecting to a reference to an “implementation agreement” as a specific possible outcome. The Russian Federation and Canada supported the US proposal, urging the group not to be too prescriptive in defining possible outcomes. Iceland expressed willingness to accept reference to “benefit-sharing” but with the US opposed referring to MPAs and EIA as “conservation measures.” The US also expressed concern about singling out benefit-sharing, expressing willingness to discuss technology transfer and capacity building. Canada and Iceland questioned reference to a “single undertaking.”

The G-77/China clarified that “single undertaking” refers to the UN practice to make joint progress on various issues that are prioritized by different countries. The Philippines explained that: the joint proposal from the G-77-China, the EU and Mexico was based on an initial proposal by New Zealand and represents agreement among the overwhelming majority across a cross-section of developed and developing countries; “single undertaking” indicates the holistic approach that needs to be taken to BBNJ; and reference to the “possible development of an implementation agreement” does not prejudice any outcome. Monaco supported the text proposed by the G-77/China, the EU and Mexico as a “significant achievement in bridging views.” Trinidad and Tobago welcomed the EU’s openness on benefit-sharing, stressing its importance from a small island developing state’s perspective. South Africa considered the joint proposal by the G-77/China, the EU and Mexico “a delicate balance,” stressing that the group had shown flexibility in renouncing their call for a diplomatic conference or the launch of intergovernmental negotiations. Co-Chair Lijnzaad suspended plenary to allow the “small group of Friends” to reconvene.

In the late afternoon Co-Chair Lijnzaad presented a revised set of draft recommendations from the “small group of Friends.” Delegates adopted by consensus the recommendations, including on initiating a process on the legal framework. Co-Chair Lijnzaad then sought feedback on a new draft recommendation proposed by the Co-Chairs, requesting the Secretary-General to prepare an inventory of existing instruments relevant to BBNJ. Argentina expressed concern regarding the sensitivity of such an inventory, and proposed, supported by the EU, that the recommendation be placed in the Co-Chairs’ summary of the meeting, for it to be picked up during the negotiations of the annual resolution on the law of the sea by the General Assembly. Delegates agreed, and then adopted by consensus the remaining recommendations regarding the mandate and future meeting of the Working Group.

The G-77/China described the consensus recommendations as a tangible outcome. Co-Chair Lijnzaad gavelled the meeting to a close at 6:20 pm.

Recommendations: The Working Group recommends to the General Assembly that:

- a process be initiated by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of BBNJ effectively addresses issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS;
- such a process address the conservation and sustainable use of BBNJ, in particular, 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;
- such a process take place in the Working Group and in the format of intersessional workshops, aimed at improving understanding of the issues and clarifying key questions as an input to the work of the Working Group;
- the mandate of the Working Group be reviewed and, as appropriate, amended with a view to undertaking the tasks entrusted by the recommendations; and
- the Working Group be reconvened in 2012 to make progress on all issues under examination within the Working Group and to provide recommendations to the General Assembly at its sixty-seventh session.

A BRIEF ANALYSIS OF THE MEETING

BRIDGING THE DIVIDE?

“The status quo is not an option.” This recurring message at the fourth meeting of the Working Group on marine biodiversity beyond areas of national jurisdiction proved to be just the driver needed for progress. Delegates arrived in New York with a clear objective in mind: that it’s high time for this process to lead to a concrete and constructive result. While, of course, views diverged as to what such a result should look like, something else became very clear from the start of the meeting: delegations had moved beyond ideological, entrenched positions that have paralyzed discussions thus far and were ready to engage in a discussion on the concepts and processes required for effective conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ).

On the one hand, this shift may be explained by the momentum generated by the adoption of the Nagoya Protocol on Access and Benefit-sharing (ABS) under the Convention on Biological Diversity (CBD) in October 2010. At previous meetings of the Working Group, it was considered premature to move forward on marine genetic resources (MGRs) before the conclusion of the CBD negotiations on ABS. The adoption of the Nagoya Protocol not only removed a perceived barrier but also provided a host of ideas and lessons learned, with the understanding that, as it stands, the Protocol does not apply to MGRs in areas beyond national jurisdiction (ABNJ). On the other hand, the altered mind-set at the meeting may be due to the fruitful informal intersessional exchanges, including at an informal workshop, coordinated by a group of developed and developing countries, as well as NGOs, which provided for the necessary additional time and non-negotiating space for delegates to “break down the issues” and start identifying a common ground on the way forward.

Even with all these preconditions in place, it was still a surprise that the Working Group agreed to initiate a process on the legal framework on a “package” of issues related the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, including on sharing benefits from marine genetic resources. This brief analysis examines the substantive and procedural options that delegates put forward in trying to bridge the divide in their positions, highlighting the initial signs of convergence and the final consensus achieved on the need for some sort of normative development on BBNJ and how to get there. The analysis will conclude by identifying some of the immediate substantive and procedural challenges that lie ahead for the continued progress on BBNJ.

BUILDING A BRIDGE

Early in the week delegations outlined their thoughts on the substantive elements needed to ensure the conservation and sustainable use of BBNJ, in many respects presenting new ideas and revealing a shared willingness to agree on the need for “guidelines, rules or mechanisms,” as New Zealand put it, sensing the cooperative spirit of the plenary.

Yet despite the cooperative spirit, views were still quite divergent. While the G-77/China and the EU had already joined forces at the 2010 meeting to push for an UNCLOS implementation agreement, this time they were also more united on the need for a “package” of issues to be addressed “at the same speed.” Thus, the G-77/China started referring to “benefit-sharing,” which was already included in the EU position last year, rather than emphasizing solely the common heritage principle; and expressed support for conservation measures, again in support of the EU priorities. Mexico clearly expressed support for progress on marine protected areas (MPAs) and environmental impact assessments (EIAs). The EU, in turn, not only continued to support benefit-sharing from MGRs (the priority of developing countries), but also supported an international regime on access to those resources. Unlike its 2010 standpoint, the EU also refrained from advocating for a fast-lane for conservation tools. That is, the EU avoided requesting work on EIAs and MPAs as a short-term measure, while leaving for later consideration the question of legal regime on MGRs as a long-term measure. NGOs welcomed the alliance, especially since they had proposed an UNCLOS implementation agreement well before the Working Group was established.

However, the same group that emerged in 2010 (Japan, Iceland, the US, Canada and the Russian Federation) remained opposed to a new UNCLOS implementation agreement and the idea of limiting marine scientific research (MSR) by setting up an ABS regime. Iceland and Norway pragmatically pointed to regional bodies as the most immediate means of making progress on MPAs and EIAs, with Canada also underscoring the usefulness of voluntary codes of conduct for MSR and of pilot sites to better assess modalities for identification and management of MPAs. The US suggested an approach similar to that adopted for bottom fisheries in MPAs: tasking the General Assembly to encourage and monitor progress by states and regional fisheries management organizations on MPAs based on international guidance, such as the work on ecologically and biologically sensitive areas under the CBD (an interesting suggestion, given that the US is not a party to the CBD).

The middle ground was occupied by Australia, who proposed combining benefit-sharing from MGRs with incentives for exploration, development and technology diffusion; and suggested immediate sharing of non-monetary benefits from MGRs through scientific cooperation and the sharing of scientific information, in response to the various calls from the G-77/China for developing country scientists to participate in MSR and benefit from capacity building and technology transfer.

Towards the end of the meeting, increasing signs of compromise emerged as the EU, the G-77/China and Mexico agreed to the “possibility” of an UNCLOS implementation agreement, rather than the actual launch of its negotiation; Iceland accepted reference to benefit-sharing; and the US opened up to technology transfer and capacity building, and the “possible development of a new international agreement building on the framework established by UNCLOS.” It then took another afternoon of wordsmithing and a further effort in flexibility for all countries to complete the bridge towards a “package” of issues, including benefit-sharing, to be addressed in the proposed process on the legal regime. Although the recommendations keep options open as to whether gaps in the legal framework should be filled through better implementation or further regulation, it explicitly points to the “possible development of a multilateral agreement under UNCLOS”—which is as close as delegates could get to a reference to an implementation agreement, given the clear instructions of countries opposing that concept.

CROSSING A BRIDGE

Finding consensus on the substantive elements was crucial, but laying the procedural path ahead was equally important, as the consensus outcome of the Working Group represents only the first step on what is most likely a very long path. The immediate question was whether the Working Group remains the right forum for discussions on the legal regime on BBNJ.

The G-77/China, the EU, Mexico and NGOs had hoped to be able to convene an intergovernmental committee to formalize the negotiating process and keep the pressure on delegations, possibly also through a blessing by the 2012 UN Conference on Sustainable Development (Rio+20), in a bid to obtain similar wording to the reference in Agenda 21 on convening an intergovernmental conference on straddling and highly migratory fish stocks. Pressure was further added by pointing to the fact that the CBD framework is not yet off the table, with South Africa warning delegates that in the absence of progress under the General Assembly, the Nagoya Protocol may evolve to also provide a home for MGRs beyond national jurisdiction. On the other hand, Canada and the US considered the Working Group an appropriate setting, as long as its agenda is more focused, so as to save on institutional costs and avoid prejudging the outcome of the process.

It was clear to all, however, that the meetings of the Working Group would be far too short for any in-depth discussion of the legal and institutional complexities arising from the package. Based on the positive experience of the intersessional informal work, Australia proposed to add workshops to the menu

of procedural options, with a view to providing extra time and a more relaxed setting to consider all options and incrementally build consensus that could then feed back into the Working Group. The idea was to favor persuasion over pressure, in a bid to bring and keep on board as many countries as possible. As delegates were informed during a side event on Friday, there are only ten countries that account for 90% of patents related to MGRs (according to *Science*, these are the US, Japan, certain EU countries, Switzerland and Norway). So what would be the point of a legal regime on BBNJ if some of these countries are not part of it? The idea of workshops, however, also lent itself to the risk of depriving the Working Group of its significance by shifting discussions to an informal setting, a fear expressed by the G-77/China when reacting to a Canadian non-paper outlining a long list of ambitious tasks for the workshops.

Eventually, the consensus outcome pacified these concerns, providing for a process that combines the Working Group, possibly with a reviewed mandate, and intersessional workshops that are clearly labelled as “an input to the work of the Working Group.” What remains to be clarified by the General Assembly when negotiating the oceans resolution is whether the mandate, or more simply the agenda, of the Working Group needs a face-lift in light of the consensus outcome, and what institutional framing would be needed for the intersessional workshops. In other words, will the workshops be under the UN or a country-led initiative?

ON TERRA FIRMA?

At its fourth meeting, the Working Group certainly proved its worth, witnessing an impressive collective effort to find a widely-shared way forward on BBNJ. The consensus that emerged at this meeting is undoubtedly a positive and perhaps even unexpected development, but only time will tell how solid the newfound common ground really is.

On the substance, the questions to be addressed on the legal framework are much more complex than the debate within the Working Group suggested, as became evident at the Friday side event on MGRs, where many delegates were taking notes throughout and asking for copies of expert presentations that could not be fully digested in one sitting. One fundamental question, for instance, which was raised once by Canada but not taken up by the Working Group, is the distinction between MGRs beyond national jurisdiction that are in the water column as opposed to the ocean floor. Other detailed questions on specific benefit-sharing, MPA and EIA modalities will also need to be acknowledged and fleshed out before delegations fully grapple with the tasks ahead and obtain the necessary instructions from capitals to that end.

On the process, it remains to be seen whether the G-77/China, EU and Mexico will remain such close allies, or whether their agreement on the elements of the “package” to be addressed “together as a whole,” will be separated again to be used as bargaining chips. Even if they remain a cohesive group, the challenge remains in ensuring, at the same time, continued progress and broad-based support with an appropriate mix of pressure and persuasion. Such a delicate balance may soon be put to the test, as the upcoming meeting of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea may provide an opportunity to send a message on BBNJ to Rio+20, and the General Assembly’s negotiations of the oceans resolution the opportunity to determine the mandate of the Working Group (or at least its agenda for 2012) and the workshops.

On Friday evening delegates were rightly celebrating consensus on the first, significant step towards an improved international framework on BBNJ, but were also cautious that consensus is like a living resource that will need balanced and continued nourishment to thrive into a more effective and complete legal regime for the conservation and sustainable use of ocean life.

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