



Global Ocean Forum News

4th Meeting of the UN Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biodiversity Beyond Areas of National Jurisdiction

Summary and Analysis

31 May - 4 June 2011

In this issue of Global Ocean Forum News, we present a brief summary and analysis of the UN negotiations related to marine biodiversity in areas beyond national jurisdiction, which took place in New York last week. This negotiating round achieved some tangible results, in contrast to earlier negotiations. There was much talk, as well, about using the Rio+20 process to advance agreement on the thorny issues dividing the countries.

This report has been prepared by Joseph Appiott, Policy Researcher at the Global Oceans Forum, who is conducting an analysis of the intergovernmental debates on biodiversity beyond national jurisdiction to identify key areas of commonality and develop a framework for identifying viable opportunities for consensus-building and potential elements of agreement.

4th Meeting of the UN Working Group on Biodiversity Beyond National Jurisdiction: Summary and Analysis, by Joseph Appiott, Global Oceans Forum

At the 4th meeting of the UN Working Group on Biodiversity Beyond National Jurisdiction, which was co-chaired by Ambassador Palitha Kohona, Permanent Representative of Sri Lanka to the UN, and Dr. Liesbeth Lijnzaad, Legal Advisor to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, delegates gathered at the UN Headquarters in New York to, once again, delve into the many complex and contentious issues related to areas beyond national jurisdiction. The Working Group has previously met in 2006, 2008, and 2010.

This summary will provide day-to-day highlights of the meeting, addressing the main topics of discussion, and a brief analysis of the proceedings.

Tuesday, May 31, 2011

With the opening of the meeting, some of the main contentious areas immediately became the center of discussion, as there was disagreement regarding the text of the Working Group's agenda. Argentina, on behalf of the G-77 and China, requested that the agenda include specific note in agenda item 5 ("Indication of possible options and approaches to promote international cooperation and coordination...") on "the relevant legal regime" for issues relating to biodiversity beyond national jurisdiction, a proposal that was contested by the US and Iceland. Agreement on the agenda was reached through the inclusion of text that specifically refers to the mandate of the Working Group as outlined in the relevant UN General Assembly resolution.

Following the adoption of the agenda, the G-77 and China, along with Chile, emphasized the importance of the principle of the common heritage of mankind and the need to facilitate and promote capacity building and inclusion of developing countries in scientific research, describing this area as the greatest implementation gap. In support of this statement, Trinidad and Tobago highlighted the International Seabed Authority's Endowment

Fund as a potentially valuable means to pursue capacity building. The G-77 and China also called specifically for official negotiations to resolve complex issues, such as the relevant legal regime for marine genetic resources. A number of other developing States, including Tanzania, Venezuela, and Ecuador, who noted the implications of the recently adopted Nagoya Protocol on Access and Benefit-Sharing, expressed their support for the statement made by the G-77 and China.

China also highlighted the importance of promoting marine scientific research as a means to contribute to discussions and resolution of specific policy issues addressed in the Working Group, and the need to undertake capacity building for developing States both to participate in research and to implement global commitments.

A central topic of discussion was the value of the regional governance approach, specifically with regards to marine protected areas. Emphasizing the importance of taking an integrated, ecosystem-based and precautionary approach to governance of areas beyond national jurisdiction, Norway highlighted the importance of regional management bodies, specifically noting effective cooperation between the OSPAR Commission and the NEAFC RFMO, as well as with other relevant regional and global organizations, as a valuable model for furthering regional governance approaches. Discussing MPAs, Canada stressed that regional management bodies are in the best position to implement area-based management and emphasized the need to build on the existing framework to delineate pilot sites as a first step towards viable marine protected areas in areas beyond national jurisdiction. Canada also noted that the nature of the rights and responsibilities under UNCLOS depend on both the type of activity and the geographical location in which this activity is undertaken.

Highlighting the precautionary and ecosystem-based approach, the Republic of Korea discussed MPAs and marine genetic resources. On MPAs, Korea noted that designation should be done in accordance with best available scientific information. Korea also supported the application of the provisions of Part VII of UNCLOS to marine genetic resources, which provides for the free utilization of these resources, subject to obligations to protect and preserve the marine environment.

The US delegation's opening statement articulated support for the use of environmental impact assessments and MPAs based in sound science and customary international law, and noted that the US did not consider it appropriate to develop a new legal regime for access and benefit-sharing for marine genetic resources. Rather, it held that a new legal regime for MGRs would hinder important scientific research.

The EU emphasized the need for a coordinated cross-sectoral approach, specifically calling for an UNCLOS Implementation Agreement to give effect to tools such as MPAs and EIAs and to develop provisions for benefit-sharing from the utilization of marine genetic resources. The delegate also noted opportunities presented by other relevant processes, such as the upcoming meeting of the UN Informal Consultative Process on Oceans and the Law of the Sea and the preparatory process for the UN Conference on Sustainable Development (UNCSD), also known as the Rio+20 process, to make progress on these issues.

The opening day was composed entirely of opening statements and an expert panel with speakers from the International Seabed Authority, the World Intellectual Property Organization, the IUCN, and the Secretariat of the Convention on Biological Diversity. Capacity building for developing states and the importance of scientific research for effective governance and management emerged as prominent themes. A number of States also highlighted the need to focus efforts towards a potential package deal to reach consensus in addressing contentious issues and the need to put forth more practical proposals for resolution.

Wednesday, June 1, 2011

On the second day of the meeting, delegates delved into agenda item 4, "Examination of the scientific, technical, economic, legal, environmental, socio-economic and other aspects of the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction."

Discussing MPAs, China highlighted a number of legal and logistical complexities and emphasized that a uniform approach to MPAs may not be appropriate as circumstances surrounding their development and application will vary. Brazil noted that differing conceptions and perspectives on the value and application of MPAs should not become a major factor that hampers their development. The EU stressed the value of a coordinated and cross-sectoral approach and the need to continue to work towards the 2012 MPA goal. The EU especially noted the need for increased global and regional cooperation. The US highlighted common concerns and interests in conservation and sustainable use and expressed its willingness to explore opportunities for applying the EBSA (ecologically and biologically significant area) criteria to the identification of potential sites for MPAs. Canada outlined the need to support the development of pilot MPA sites. Discussing EIAs, Canada noted its support for taking an integrated approach while recognizing the fundamental role of sectors.

Marine genetic resources were addressed by many of delegations on Wednesday. Argentina, on behalf of the G-77 and China, discussed the need to consider issues related to intellectual property rights (IPR) for marine genetic resources and how to operationalize the ecosystem-based approach for MGRs. The G-77 also highlighted the lack of data provided by States on products derived from marine genetic resources. New Zealand highlighted gaps in the current framework for areas beyond national jurisdiction and outlined the fact that marine genetic resources were not considered during the negotiation of UNCLOS. Noting the need to promote balance between environmental protection, freedom of States, and sustainable use, Canada emphasized the need to promote research and innovation with marine genetic resources, based on the precautionary approach, and welcomed efforts to promote voluntary codes of conduct for activities surrounding marine genetic resources.

Mexico emphasized the need to address issues related to marine genetic resources in the context of a package-deal agreement and proposed the development of an intergovernmental negotiation process established by the UNGA. It also highlighted the need to look towards potential models of benefit-sharing, including the Nagoya Protocol and the TRIPS agreement (Agreement on Trade Related Aspects of Intellectual Property Rights). The US stressed the need to focus on conservation and facilitating opportunities for capacity building for the participation of developing States in research. The US stated its disagreement with the argument regarding the need for a new UNCLOS Implementation Agreement or a new intergovernmental negotiation process for areas beyond national jurisdiction.

Australia stressed the need to build consensus on elements of commonality, including the protection and conservation of marine genetic resources and mitigation of adverse impacts related to the exploitation of living resources, and noted the need to consider practical approaches for access and benefit-sharing for marine genetic resources.

The EU noted its support for Mexico's proposal for an intergovernmental negotiation process, reiterating its support for an UNCLOS Implementation Agreement built on principles such as the science-based approach, transparency, and the integrated and ecosystem-based approaches. The EU also raised the issue of the potential need to reconsider the mandate of the Working Group.

The G-77 and China, supported by other delegations, stressed that the status quo is not acceptable and that the various issues relating to marine genetic resources, including provisions for access and benefit-sharing, should be addressed in the context of an UNCLOS Implementation Agreement. South Africa and Brazil noted their support for a "package deal" UNCLOS Implementation Agreement and commented on the groundswell of support for this approach.

Canada agreed with other delegations that the status quo is not acceptable but also cautioned that it might be premature to enter into a new negotiating process, noting the need to make progress within the existing

framework. Canada suggested focusing future discussions on a smaller and more specific subset of issues with additional intersessional work between Working Group meetings. Norway and Iceland echoed the caution expressed by the US and Canada, noting their unwillingness to support an UNCLOS Implementation Agreement and stressed that there is much more work to be done in implementing the existing framework, especially through regional approaches. Japan and Russia stressed the need to focus on gaps in implementing the existing framework before considering new arrangements and to utilize the benefits of an intersessional process to explore complex issues and facilitate more productive discussion.

Noting the disagreement relating to an Implementation Agreement, Australia proposed a series of intersessional workshops involving States as well as relevant scientific and technical experts that would focus on complex issues under discussion, including issues related to marine genetic resources and access and benefit-sharing.

As there were no immediate responses to this proposal, the Co-Chairs suspended the meeting to allow delegations to consider the various proposals advanced during the day's productive discussions.

Thursday, June 2, 2011

In response to the proposal of the Australian delegation from the previous day, both the EU and Canada drafted and distributed "non-papers" outlining various proposed elements of agreement.

The EU "non-paper" outlined a potential structure of an UNCLOS Implementation Agreement, based on management centered around MPAs, EIAs, marine genetic resources (with provisions for both management, and access and benefit-sharing), and assessment of implementation and capacity building.

The Canadian "non-paper" outlined a potential intersessional process, which described elements such as the preparation of scientific and technical synthesis papers, expert workshops composed of scientific, legal, and policy experts. Canada proposed that such a process could specifically address knowledge gaps, the applicable legal regime for marine genetic resources, and the identification of relevant policy considerations.

In the general discussion, a number of delegations, including Iceland and New Zealand, voiced support for the proposals and discussion of an intersessional process. Trinidad and Tobago noted the importance of seeking the support of the UN General Assembly for these workshops. The UNDOALOS noted that these types of workshops could be organized either by the UN or by States themselves, and briefly outlined the complexities associated with both options. The G-77 and China also supported such an intersessional process, but emphasized that there must be clarity and a full understanding as to what exactly these workshops would be for, noting that they must not impede the mandate of the Working Group itself.

In light of the need to further discuss complex logistical issues and the various proposals on the table, the Co-Chairs closed the meeting early in the day to allow for intergovernmental discussions in small groups to craft the recommendations.

Friday, June 3, 2011

At the opening of the day's discussions, the Co-Chairs described the diligent work and tough discussions of the previous evening to put forth a viable set of draft recommendations, which included text on the consideration of a possible Implementation Agreement to UNCLOS and workshops to address the technical issues associated with ABNJ issues.

The US voiced its opposition to the text on a possible Implementation Agreement to UNCLOS and, referring to its own proposed text, emphasized the need to not limit the outcome of future discussions to an Implementation Agreement as the only global multilateral option to address these issues, if such an approach is deemed

necessary. The proposed text of the US, which described “the possible development of new international agreement building on the framework established by UNCLOS,” was supported by Russia and Canada.

Other draft text was proposed by the G-77 and China, Mexico, and the EU, which called for “the possible development of an implementation agreement to UNCLOS” and the creation of a process to address conservation and sustainable use “as a single undertaking.” A large number of delegations voiced their support for the G-77 proposal, and some, including South Africa and Ecuador, noted that they had hoped to see text of this proposal go even further.

The G-77 and China expressed a lack of understanding regarding the opposition of the US to text on an UNCLOS Implementation Agreement, since there has been widespread agreement on UNCLOS as being the framework by which to address these issues. As well, other delegations expressed concern for the lack of clarity of the proposed text of the US. Brazil noted the successful development of the UN Fish Stocks Agreement as an UNCLOS Implementation Agreement and how this process would be similar to a possible approach for areas beyond national jurisdiction.

Following a round of comments, the Co-Chairs again broke from plenary to hold discussions in small groups to reach consensus on text for the recommendations. After much deliberation, the Co-Chairs returned to plenary with recommendations that call for the initiation of a process to identify gaps and ways forward, "including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS."

This "process" would address issues related to conservation and sustainable use “together and as a whole” and would take place:

- (1) Within the Working Group, following an explicit reconsideration of the Working Group's mandate so as to make it better able to address these issues; and
- (2) Through intersessional workshops aimed at improving understanding of the scientific, legal, and technical aspects associated with these issues and clarifying key questions.

Analysis

Although the discussions of the Working Group meeting again brought the contentious issues associated with biodiversity beyond national jurisdiction to light, these discussions proved much more productive and action-oriented than those of previous meetings, with practical proposals and counter-proposals put forth throughout the week.

Compared to previous meetings of the Working Group, there appeared to be more cooperation and compromise at this meeting. Despite disagreement on controversial issues, such as marine genetic resources and the possible development of a “package deal” agreement, a number of nations who had been steadfastly opposed to considering new arrangements and approaches, now indicated that they are open to at least considering the need for a new international agreement and potential provisions for benefit-sharing. States appeared to be less entrenched in their positions, moving away from unproductive reiteration of positions on controversial issues. There was widespread agreement on the need to make tangible progress on issues of common concern and a demonstrated convergence of opinion on the need to address, or at least to consider addressing issues related to conservation and sustainable use, in an interlinked approach, possibly in the form of a “package deal.” While a few nations were generally opposed to the “package deal” approach, there was a large coalition of nations supporting this type of eventual outcome. What emerged from these discussions were forward-looking recommendations to the UN General Assembly containing text that aims to stimulate progress on both the political and practical issues associated with the conservation and sustainable use of biodiversity beyond national jurisdiction.

There are a number of factors that may have facilitated the productive discussions taking place at this meeting. One potential factor could have been the general disappointment with the outcomes of the 2010 meeting of the Working Group. The convening of this meeting in two consecutive years for the first time since its initial meeting in 2006 may have also contributed to the growing sense of urgency to work towards more action-oriented outcomes. The progress being made in other global and regional fora either directly or indirectly related to these issues may have also contributed to this sense of urgency. Another potential factor facilitating progress at this meeting was the growing understanding of the various logistical and technical issues associated with implementing various management tools, and the recognition of the fact that many of these technical issues can be surmounted. When issues related to biodiversity beyond national jurisdiction first became a focus of international discussion, there was relatively little understanding as to how to resolve the various technical issues associated with implementing tools such as MPAs and EIAs in areas beyond national jurisdiction. However, recent progress in various global and regional contexts, combined with a growing base of analysis in the form of scholarly literature and expert workshops, are demonstrating the viability of potential avenues for addressing these issues.

The constructive discussions of the meeting, along with its action-oriented outcomes, paint a hopeful picture for biodiversity beyond national jurisdiction. Increasing attention being focused on these issues by governments, inter-governmental fora, international organizations, and non-governmental organizations, as well as progress being made through various regional mechanisms, indicate growing consensus on the need to address urgent issues associated with biodiversity beyond national jurisdiction. As well, other related activities and upcoming events, such as the UN Conference on Sustainable Development, also called the Rio+20 Conference, the UN Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), and the 2012 International Biodiversity Day (May 22, 2012), which is focused on marine and coastal biodiversity, present important opportunities to raise the profile of issues related to biodiversity beyond national jurisdiction, foster increased support from the public and high-level decision-makers to address these issues, and identify potential opportunities to work collaboratively with other related fora to address important drivers of change affecting biodiversity in areas beyond national jurisdiction.