

## **Roundtable on “New Rules for the Oceans”**

**27 July 2011, London**

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### **Summary Report**

The Foundation for International Environmental Law and Development (FIELD) convened this roundtable to consider the recent recommendation<sup>1</sup> 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 (WG-ABNJ) relating to ensuring that:

*“the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of multilateral agreement under the United Nations Convention on the Law of the Sea (UNCLOS).”*

The roundtable, which brought together representatives of non-governmental organisations, marine scientists and academia, was held under the Chatham House Rule of non-attribution.

Following a presentation by FIELD participants discussed a range of issues including:

#### **How will non-parties to UNCLOS be bound?**

Issues might arise through certain states not being party to UNCLOS. Participants commented that certain key states recognise UNCLOS as customary international law and accordingly consider themselves to be bound by its terms. It was also highlighted that the International Court of Justice (ICJ) recently recognised Environmental Impact Assessment (EIA) as customary law<sup>2</sup> and the International Tribunal for the Law of the Sea<sup>3</sup> (ITLOS) included precaution and best environmental practices as an integral part of the due diligence when States sponsor person and entities with respect to activities in the Area.

#### **Can we wait for UNGA?**

Participants noted the urgency of ABNJ issues. It was noted that, not only are destructive fishing practices increasing, but other activities such as mining and the exploitation of

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<sup>1</sup> See Annex

<sup>2</sup> International Court of Justice, Case Concerning Pulp Mills in the River Uruguay, Argentina v. Uruguay, 2010

<sup>3</sup> Advisory Opinion of the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea – Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, February 2011

renewable energy will also have negative impacts. Recent discoveries of significant reserves of rare earth minerals in ABNJ between Tahiti and Hawaii also pose a potential threat.

However, participants noted how much time had already passed since a potential multilateral agreement under UNCLOS was first suggested. It was also noted that we were now entering a lengthy process of negotiation at the UN General Assembly relating to a diverse package of issues. Accordingly, it was likely that such a multilateral agreement would not be in place for a significant number of years to come.

Participants noted that given these circumstances, it is essential that existing regional and sectoral initiatives should not wait until such an agreement is in place and action is taken now.

### **Is there a risk of the process being derailed at the UN General Assembly meeting in September and in general?**

A comment was made that the deliberations of the WG-ABNJ were not discussed at the recent meeting of UNICPOLOS for fear of states backtracking on the WG-ABNJ’s recommendations. To avoid stalling and misunderstanding, it was suggested that the first step could be to agree on the principles that would guide the process, either through a declaration or a road map. International environmental law is evolving and new customary law is being created. As happened with the UN Fish Stocks Agreement, the process about to start would have to bring into the legal framework several principles and instruments that were not mentioned in UNCLOS.<sup>4</sup>

It was also noted that other potentially controversial issues might arise in September, including states falling well short of their obligations in respect of deep water bottom trawling and vulnerable marine ecosystems. Whilst progress had been made by certain states, compliance has been hugely inconsistent.

It was noted that rules of the World Trade Organization may well be used by states trying to avoid their obligations under existing and any new processes.

### **Principles**

Participants discussed a number of principles that are central to resolving issues in ABNJ. The importance of ecosystem-based management and international cooperation was noted as needing to have a central role in all initiatives.

Certain principles were also raised for possible inclusion in a multilateral agreement. A multilateral agreement could define the role and standards of regional bodies, including for example obligations to protect and preserve the environment and to adopt science-based approaches in ABNJ. Other principles were also noted as relevant, such as equity, the precautionary approach, science-based decision-making and transparency.

It was pointed out that recent comments to the Seabed Dispute Chamber of ITLOS by some states had shown a fundamental lack of understanding about the precautionary principle.

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<sup>4</sup> According to UNCLOS Art. 300, States should also act in accordance with other rules of international law.

### **The importance of ecosystems management**

It was noted that the principle of ecosystems management must underpin all future initiatives whether they are on a global or regional basis. Participants agreed that you cannot “argue with biology” and that science-based approaches must be central to any initiative.

In relation to fishing in particular, it was noted that the lack of a science-based approach often leads to total allowable catch limits being set well above sustainable levels and can lead to “crashed fisheries”.

### **Transparency and data**

It was highlighted that transparency, and specifically the disclosure of information by fishers, is a central issue. It was suggested that states might hide behind a curtain of “commercial confidentiality” to prevent the disclosure of how much fish they are taking and from which areas. Participants also pointed out that this is also a key problem in EU waters and in the ongoing reform of the EU Common Fisheries Policy.

Participants noted that the provision of clear and sufficient data is essential to the adoption of ecosystem-based management.

### **Sustainable development**

Participants noted that the arguments for an effective legal framework in ABNJ are not only based on environmental concerns. It was commented that economic losses through the mismanagement of high sea fisheries approach US\$50 billion every year. The effects on employment are also very significant, particularly in relation to artisanal fisheries. A moral argument can also be made that preventing illegal fishing could, in theory, feed 20-30 million people. Participants noted the relevance of approaches based on equity, fairness and food security.

It was noted that different approaches may be necessary to halt the damaging impacts of a globalised society, which had not been present when much of the current governance structure was put in place. Participants also mentioned the need to engage with the industrial sector.

### **The relevance of sectoral instruments**

The importance of working with various sectors was noted. For example, in relation to the work of the International Maritime Organization (IMO), it was stated that the designations of Particularly Sensitive Sea Areas and Special Areas usually only met with limited opposition. This may provide a platform enabling the possible “layering” of other protective measures using IMO initiatives as a base. The Charlie Gibbs Fracture zone was quoted as an example.

However, participants noted the slow speed of IMO processes and the conflicts between the IMO’s “no favourable treatment” and other regimes based on “common but differentiated responsibilities”.

### **“OSPARisation” – regional approaches**

It was noted by participants that whilst regional fisheries management organisations (RFMOs) were to a large extent dysfunctional, significant numbers of additional organisations would further complicate governance. “Accordingly, conservation may need to fall under an expanded role for RFMOs.”

The work of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the North East Atlantic Fisheries Commission (NEAFC) was put forward as a possible model for such cooperation, and there was mention of rolling out this model to other regions in a gradual “OSPARisation” of the oceans. However, participants noted potential funding issues with this approach.

A participant commented on the need to ensure that regional approaches are tailored to take account of relevant regional issues. The need for a decentralised approach was compared to the current reform of the EU Common Fisheries Policy and the desire to avoid “micromanagement from Brussels”.

### **The role of a global governance organisation and cross-sectoral cooperation**

One participant noted that a global governance organisation could be used to “shrink the fisheries monster” to its real size. However, another added that one should be careful not to create a “super monster” organisation with an even larger remit. The decision making process of a central body would have to be quick and respond to specific needs. For example, if a region identifies pollution as the main concern, the competent sectoral and regional bodies would need to have the mandate to take immediate action.

Participants discussed the possible role of a global organisation, including establishing guiding principles which would bind regional initiatives, and promoting regional cooperation and sectoral coordination in relation to issues in ABNJ.

It was noted that such an organisation could for example be linked to a tribunal such as the International Tribunal on the Law of the Sea. Clear and swift adjudications would be central to any dispute settlement and compliance structure.

### **Funding issues**

The issue of funding a regime for ABNJ was discussed. A participant commented that the International Seabed Authority could serve as a potential model. It was noted that funding was a long-standing issue dating back several decades. Participants commented on using suggested the possibility of allocating some of the shared benefits for the use of marine biodiversity in part of the shared benefits for conservation, management and capacity development purposes activities. User charges, levies and market-based mechanisms were also mentioned as potential sources of funding.

### **IUU Fishing**

Initiatives were discussed in relation to criminalising illegal, unreported and unregulated (IUU) fishing. A number of participants had been involved in this process. Synergies between approaches were discussed between participants with a view to effectively taking this matter forward.

## **ANNEX**

Ad Hoc Open-ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.

3 June 2011

The Working Group recommends to the General Assembly that:

1. A process be initiated, by the General Assembly, with the view to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS;
2. This process would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology;
3. This process would take place:
  - i) in the existing working group; and
  - ii) in a 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;
4. The mandate of the Working Group be reviewed and, as appropriate, amended with a view to undertaking the tasks entrusted by these recommendations;
5. Requests the Secretary-General to convene a meeting of the Working Group 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.

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