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Oceans and the law of the sea

Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly

Pursuant to paragraph 80 of General Assembly resolution 60/30, we were reappointed as Co-Chairs 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, which was established pursuant to paragraph 73 of General Assembly resolution 59/24. In accordance with paragraphs 199 and 200 of General Assembly resolution 68/70, the Working Group met from 20 to 23 January 2015.

We are pleased to inform you that the Working Group has fulfilled its mandate to provide recommendations to the General Assembly, as requested in paragraph 214 of resolution 69/245. We have the honour to submit to you the outcome of the meeting, consisting of recommendations adopted by consensus by the Working Group and a Co-Chairs' summary of discussions at the meeting (see annex).

It would be appreciated if the present letter and the annex thereto could be circulated as a document of the General Assembly, under agenda item 74 (a).

(Signed) Palitha T. B. **Kohona**

(Signed) Liesbeth **Lijnzaad**

Co-Chairs

* Reissued for technical reasons on 10 March 2015.



Annex

Outcome 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 and Co-Chairs' summary of discussions

I. Recommendations

1. 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 recommends to the General Assembly that it:

(a) Reaffirm the commitment made by Heads of State and Government in paragraph 162 of the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, from 20 to 22 June 2012, entitled "The future we want" and endorsed by the General Assembly in its resolution 66/288 of 27 July 2012, to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea, before the end of the sixty-ninth session of the Assembly;

(b) Note its request to the Ad Hoc Open-ended Informal Working Group to make recommendations on the scope, parameters and feasibility of an international instrument under the Convention contained in paragraph 214 of resolution 69/245;

(c) Welcome the exchange of views on the scope, parameters and feasibility of an international instrument under the Convention and the progress made within the Ad Hoc Open-ended Informal Working Group, within its mandate established by resolution 66/231 and in the light of resolution 67/78, to prepare for the decision on the development of an international instrument under the Convention to be taken at the sixty-ninth session of the General Assembly;

(d) Stress the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and having considered the feasibility of developing an international instrument under the Convention;

(e) Decide to develop an international legally binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and to that end:

(i) Prior to holding an intergovernmental conference, decide to establish a preparatory committee, open to all States Members of the United Nations, members of specialized agencies and parties to the Convention, with others invited as observers in accordance with past practice of the United Nations, to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the Convention, taking into account the various reports of the Co-Chairs on the work of the Ad Hoc Open-ended Informal Working Group, the preparatory

committee starting its work in 2016 and, by the end of 2017, reporting to the Assembly on its progress;

(ii) Before the end of the seventy-second session of the General Assembly, and taking into account the aforementioned report of the preparatory committee, will decide on the convening and on the starting date of an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the preparatory committee on the elements and to elaborate the text of an international legally binding instrument under the Convention;

(f) Decide that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of 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, environmental impact assessments and capacity-building and the transfer of marine technology;

(g) Recognize that the process indicated in subparagraph (e) above should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;

(h) Also recognize that neither participation in the negotiations nor their outcome may affect the legal status of non-parties to the Convention or any other related agreements with regard to those instruments, or the legal status of parties to the Convention or any other related agreements with regard to those instruments.

II. Co-Chairs' summary of discussions**

2. In paragraph 198 of its resolution 68/70, the General Assembly requested 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, within its mandate established by resolution 66/231 and in the light of resolution 67/78, and in order to prepare for the decision to be taken at the sixty-ninth session of the Assembly, to make recommendations to the Assembly on the scope, parameters and feasibility of an international instrument under the United Nations Convention on the Law of the Sea. To that end, the Assembly decided that the Working Group should meet for three meetings of four days each, with the possibility of the Assembly deciding that additional meetings would be held, if needed, within existing resources.

3. The first and second of those meetings of the Working Group were held at United Nations Headquarters from 1 to 4 April 2014^a and from 16 to 19 June 2014,^b respectively, in accordance with paragraphs 199 and 200 of resolution 68/70. The third meeting was held at United Nations Headquarters from 20 to 23 January 2015, in accordance with paragraphs 199 and 200 of resolution 68/70 and paragraph 214 of resolution 69/245.

** The summary is intended for reference purposes only.

^a See [A/69/82](#).

^b See [A/69/177](#).

4. The meeting of the Working Group was presided over by two Co-Chairs, Palitha T. B. Kohona (Sri Lanka) and Liesbeth Lijnzaad (Netherlands), appointed by the President of the General Assembly in consultation with Member States.
5. The Under-Secretary-General for Legal Affairs, the Legal Counsel, Miguel de Serpa Soares, delivered opening remarks on behalf of the Secretary-General.
6. Representatives of 104 Member States, 2 non-Member States, 17 intergovernmental organizations and other bodies and 11 non-governmental organizations attended the meeting of the Working Group.
7. The Working Group adopted the agenda (A/AC.276/11) without amendment and agreed to proceed on the basis of the proposed format and annotated agenda and organization of work (A/AC.276/L.16).
8. Following informal consultations, on 23 January 2015 the plenary of the Working Group adopted the recommendations contained in section I above by consensus. The delegations of the Bolivarian Republic of Venezuela and Colombia made statements explaining their position after the adoption of the recommendations (see para. 33).
9. In accordance with the format and at the request of the Working Group, the Co-Chairs prepared the present brief summary of discussions on key issues, ideas and proposals referred to or raised during the deliberations. The general considerations made during the meeting are reflected in paragraphs 10 to 25 below. Comments of a general nature made in the context of the consideration of draft recommendations to the sixty-ninth session of the General Assembly are reflected in paragraphs 26 to 34.

General considerations, including on the scope, parameters and feasibility of an international instrument under the United Nations Convention on the Law of the Sea

10. Delegations recalled the importance and urgency of addressing the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. Several delegations observed that addressing the issue would also address sustainable development issues, in particular food security and poverty alleviation. Several delegations highlighted, in particular, that oceans were the foundation of small island developing States' economies, environment and societies and that, in recent years, accumulating and compounding human impacts had undermined the health of the oceans, thereby gravely threatening the well-being and livelihood of those States' populations. In that context, marine biodiversity beyond areas of national jurisdiction was considered of critical importance, owing to its shared, transboundary nature and its interconnectedness to coastal ecosystems. It was noted that national and regional efforts to conserve and sustainably use biodiversity could be jeopardized by the challenges posed by activities beyond areas of national jurisdiction. Those delegations called for strengthened cooperation and coordination among all sectors and at all levels. Several delegations expressed the view that a global universal governance structure remained the best way to promote sustainable marine biodiversity beyond areas of national jurisdiction.
11. Delegations recalled paragraph 162 of the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want" (resolution 66/288, annex), in which States committed to address, on an urgent

basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea. Many delegations welcomed the progress made at the meetings of the Working Group held in April and June 2014.

12. Many delegations reiterated that the status quo was not acceptable and considered that there was growing momentum to recommend to the General Assembly that it decide to launch negotiations to develop an international instrument under the Convention. They considered that the elaboration of such an instrument was feasible from a political, legal and technical standpoint. In their view, the instrument would have to be negotiated on the basis of, and address, the package of issues agreed upon in 2011 in resolution 66/231, namely 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. Many delegations supported negotiating such an instrument as a legally binding agreement under the Convention. Several delegations underlined that a third implementing agreement to the Convention would respond to the urgent need to depart from the status quo and bring added value to the present legal regime for oceans and seas by moving from sectoral and fragmented approaches to a global and more coherent approach. Such an agreement, several delegations noted, would implement, strengthen and elaborate on a number of obligations already embodied in the Convention without altering the existing legal order established therein. Several delegations also pointed out that an agreement would reduce existing governance gaps by providing a comprehensive legal and institutional framework for marine biodiversity beyond areas of national jurisdiction. A view was expressed that such a regime would ensure predictability and uniformity in the conduct of States. It was emphasized that the response to the challenge of the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction could not be left to unilateral action or to organizations with limited participation and that common goods could not be appropriated by or left to the exclusive administration of a few which did not represent the interests of the international community.

13. Some delegations stated that discussions had not been exhausted on the way forward to address issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and that some questions still needed to be addressed. It was observed that the status quo was mainly due to limited political will to implement existing instruments, which did not constitute a legal gap but one of implementation that would not be addressed by adopting a new instrument. Some delegations observed that focusing on the effective implementation and enforcement of existing legally binding instruments would better ensure the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. In that regard, given the need to tackle issues on an urgent basis and the significant resources and efforts required to negotiate a new instrument, preference was expressed for focusing on ways to strengthen the implementation of existing instruments.

14. Some delegations expressed concern about negotiating a new legally binding agreement without a clear understanding of what it would cover. It was noted that

while there was some clarity on the breadth of questions involved, there was insufficient clarity on possible answers. The view was also expressed that the package agreed in 2011 was no more than a description of major topics to be addressed, which did not specify which activities would be covered by a new instrument or clarify that a new instrument would not prejudice the rights, duties and interests of States, and not diminish authorities or mandates under existing international law.

15. Several delegations highlighted the need to complement, respect and avoid duplication with existing instruments, in particular the Convention. Some delegations stressed the need to take into account ongoing activities. Several delegations suggested that the future arrangement should build on the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, as well as other relevant treaties, to provide a uniform regime for biodiversity beyond areas of national jurisdiction.

16. The need to take into account the relevant general principles of international law and the rights and duties enshrined in international legal instruments, in particular the Convention, such as the principle of the common heritage of mankind and the freedom of the high seas, was emphasized by several delegations. Some delegations reaffirmed the importance of preserving the balance of interests, rights and obligations enshrined in the Convention and between competing uses of the oceans and conservation and sustainable use objectives. It was emphasized that, should negotiations be launched, any discussions and resulting instrument should focus on cooperation and collaboration between institutions and ensuring a functioning relationship between the different activities in areas beyond national jurisdiction, not on managing those activities.

17. Many delegations noted with concern the absence of a comprehensive global regime to address the legal gaps relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. Other delegations drew attention to the fact that a number of existing instruments were applicable. A view was expressed that the focus of any new agreement should therefore be on issues where there were shortcomings or gaps in the current framework. In that regard, it was noted that while legal gaps could be addressed in the context of a new agreement, such gaps had yet to be specifically identified.

18. Several delegations underlined the existence of a legal gap concerning access to, and benefit sharing from, marine genetic resources of areas beyond national jurisdiction. In the view of several delegations, those resources were the common heritage of mankind, in accordance with resolution 2749 (XXV). They noted that those resources were currently being exploited without the concomitant obligation to share the benefits derived therefrom and that a specific legal regime needed to be developed to implement the common heritage of mankind, taking into account the interests and needs of developing countries, including States non-parties to the Convention. It was highlighted that marine genetic resources beyond areas of national jurisdiction could not be subject to unilateral access and use.

19. It was suggested that the scope of a new instrument should encompass all marine resources in areas beyond national jurisdiction currently known or

discovered at any time in the future. In that regard, while support was expressed for the inclusion of fisheries in a new instrument, taking into account the work of existing regional fisheries management organizations, other delegations observed that fisheries in the high seas were already regulated under the United Nations Fish Stocks Agreement and should therefore not be included in the scope of such an instrument.

20. The importance of not deterring scientific research was emphasized, given that research on marine genetic resources was a relatively new and quickly evolving field and that innovation could be hampered by cumbersome and excessively bureaucratic procedures. It was reaffirmed that intellectual property rights issues should be addressed within the competent forums, such as the World Intellectual Property Organization.

21. The need to enhance scientific understanding of areas beyond national jurisdiction was considered a priority, as was the need for sound science to inform decision-making. It was noted that the transfer of technology must be compatible with existing frameworks, including those under the United Nations Educational, Scientific and Cultural Organization.

22. Several delegations noted that a legally binding agreement should incorporate widely accepted principles of ocean governance, such as the precautionary principle, integrated ocean management and an ecosystem approach. A view was expressed that it would not be appropriate to use a “one size fits all” approach for every activity in all regions, as impacts vary across sectors and regions, based on particular circumstances and characteristics. It was observed, with particular reference to transboundary environmental impact assessments, that care should be exercised in applying to marine biodiversity beyond areas of national jurisdiction approaches developed in the context of planned activities within the jurisdiction or control of States.

23. Several delegations suggested that an agreement should establish institutional mechanisms to assist parties in implementing their obligations. They expressed the view that the mandate of the International Seabed Authority could be expanded to oversee the implementation of a future agreement under the Convention. Other delegations observed that the Authority could serve as a model for any institution developed under a new agreement. A view was expressed that new structures or institutions should be established only if considered necessary.

24. The need to take into account the views of all stakeholders was emphasized. In particular, it was suggested that civil society, international organizations and industry associations that had an interest in activities that could be affected by any future instrument should be invited to engage and contribute their views and expertise.

25. Some delegations underscored that any new agreement should be open to all States, whether parties or non-parties to the Convention. Several delegations stressed that accession to an implementing agreement on the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction under the Convention should not prejudice accession thereto of States non-parties. Some delegations indicated that acceding to such an agreement would not imply acceptance of any legal obligations arising from instruments that had not been explicitly accepted by States non-parties. In that regard, some delegations expressed

the view that issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction should be regulated under an international instrument other than the United Nations Convention on the Law of the Sea, such as the Convention on Biological Diversity, or as an addition to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. It was also suggested that the criteria and principles enshrined in various existing instruments could be adapted to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction, bearing in mind the principles of responsibility, cooperation, equality and sustainability.

Consideration and adoption of draft recommendations to the sixty-ninth session of the General Assembly

26. The Co-Chairs presented a non-paper dated 17 December 2014, which contained draft elements of recommendations to the sixty-ninth session of the General Assembly and had been prepared upon the request of delegations at the meeting of the Working Group held in June 2014. The Co-Chairs explained that the non-paper was a compilation of the elements submitted by delegations in response to their letter dated 8 July 2014, with a view to facilitating the development of draft recommendations. They noted that it was not envisaged that the non-paper would constitute the basis for negotiations on the draft recommendations, especially since the elements contained therein did not purport to reflect consensual elements. Delegations expressed their appreciation to the Co-Chairs for preparing the non-paper, which they considered to constitute a good basis for elaborating draft recommendations.

27. Many delegations expressed support for recommendations to launch a negotiating process for an international legally binding agreement. It was observed that, under the mandate of the Working Group, including the mandate established by resolution 66/231, and taking into account the commitment made by States in paragraph 162 of the outcome document of the United Nations Conference on Sustainable Development, entitled “The future we want”, the option of addressing issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction through the implementation of existing instruments was still available.

28. With regard to the possible content of an international instrument, many delegations expressed the view that the draft recommendations should reflect consensual elements only, highlighting in particular the package agreed in 2011, without touching upon issues that were still under discussion. A view was expressed that the package was not robust enough to constitute the basis for negotiations of a new instrument.

29. Several delegations stressed that the recommendations should include a reference to the need to recognize, respect and complement the competence and mandates of existing global and regional organizations and frameworks and to foster and strengthen cooperation and coordination between existing bodies. It was proposed that the recommendations include recognition of the primary role of the Convention and its principles, such as freedom of the high seas and the common heritage of mankind. A suggestion was made that the recommendations could include such parameters as taking a practical approach, cost-effectiveness, adequate financial incentives and the use of existing frameworks to avoid unnecessary costs.

Other delegations cautioned against engaging in de facto treaty negotiation before formal negotiations for an international instrument under the Convention had actually commenced, as many issues would need to be resolved during such negotiations.

30. With regard to the next stage of the process, many delegations called for the recommendations to include the convening of an intergovernmental conference under the auspices of the United Nations with the mandate to negotiate an implementing agreement under the Convention and to address, in particular, together and as a whole, the package of issues agreed in 2011. Several delegations suggested that the intergovernmental conference should be convened as soon as possible and should complete its work within an agreed deadline. Several delegations suggested that the resolution to be adopted by the General Assembly could set the timeline for negotiations. Highlighting the complexity of the issues, a delegation stated that it would not be appropriate to pre-set a timetable for negotiations at that stage.

31. Many delegations expressed the view that convening a preparatory process with the mandate of making recommendations to an intergovernmental conference could be useful. A view was expressed that the most important task of the preparatory committee should be to determine specifically those areas for which a new agreement was necessary and those where it would be sufficient to strengthen cooperation under existing instruments. In that regard, it was observed that the discussions in the Working Group had been very rich and that the preparatory process should draw upon and benefit from this work. The view was expressed that the recommendations of the Working Group should be specific enough to provide guidance and framing to the preparatory process, without going into the detail of what needed to be negotiated.

32. Many delegations observed that the preparatory process should be open to all States Members of the United Nations, as well as to parties to the Convention. The need to ensure that the negotiations were inclusive and transparent was also underscored.

33. Following informal consultations, which were conducted on the basis that “nothing is agreed until everything is agreed”, the Working Group adopted the recommendations included in section I above by consensus. The delegation of the Bolivarian Republic of Venezuela indicated that, because it was not a party to the Convention, the norms of the Convention, including those characterized as customary law, were not applicable to it, except for those that it had expressly recognized. It was also stated that a lack of objection to the recommendations adopted at the meeting could not be interpreted as a change in position of the Bolivarian Republic of Venezuela with regard to the Convention and its role in the framework of a future legal regime for marine resources beyond national jurisdiction. The delegation of Colombia indicated that it had joined the consensus on the understanding that this support did not imply acceptance by Colombia of the provisions or the obligations contained in the Convention, to which it was not a party. The delegation stressed that under no circumstances could it be inferred that the Convention or any other international instrument related to the recommendations were applicable or opposable to Colombia.

34. Delegations expressed appreciation to the Co-Chairs for their leadership and guidance since 2010. They also thanked the Secretariat.