



Permanent Mission of the Federated States of Micronesia to the UN

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Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction – Second substantive session

Item 6: Informal Working Group on *Environmental Impact Assessments* (point 5.4)

**Intervention by Mr. Leonito Bacalando Jr.
Assistant Attorney General**

New York, 1 April 2019

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Mr. Facilitator,

Regarding 5.4 of the Aid to Negotiations, we offer the following comments and observations:

- The purpose of an environmental impact assessment (EIA) is to assess the adverse environmental impacts and risks of damages that might be caused by a proposed project or activity for the purpose of informing decision makers regarding those impacts before making any decision one way or another. Through the conduct of an EIA, a decision will benefit from factual evidence. But it is not the function of an EIA to make a final decision on whether to approve or reject a proposed project or activity.
- Pursuant to general international law, EIA is required *where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.*” *Pulp Mills Case*, ICJ, 2010.
- In the event that a scoping exercise reveals the potential transboundary impacts arising from a proposed project or activity, then a full EIA becomes mandatory.
- Micronesia supports the view expressed on Friday by various delegations including United States, Japan, Canada and Australia, that States Parties shall be responsible for determining whether an EIA is required, and in that manner, Micronesia supports Option B of Option III as expressed by PSIDS.

- In cases where States Parties are the proponents of a project or activity proposed to be carried out on the ABNJ, there could arise a question on whether it would be proper for a State Party in that particular situation to be the entity responsible for the conduct of an EIA, while at the same time, be the decision maker on whether a proposed project or activity should be approved in the first place. There is a potential conflict of interest in this situation. And, whether such potential conflict is acceptable or not needs to be clarified, but it is not clearly addressed in the President's Aid to Negotiations. Micronesia sees overwhelming merit in the view that such potential conflict of interest should be considered unacceptable.
- In certain geographical areas, national jurisdictions and areas beyond national jurisdictions are intimately connected. To demonstrate this by way of an example, with respect to the areas of the extended continental shelf (ECS), although the water column above them is considered beyond national jurisdiction, any activity in such water column could have significant impacts upon the biological diversity and living resources on the seabed and subsoil of the extension of the national continental shelf. The interconnectivity among resources between the national and "beyond" jurisdiction are even more significant in the High Sea areas that are surrounded by several national jurisdictions—in other words, the High Sea pockets. Some of the High Sea pockets could be found in the Pacific Region. If States Parties do have unrestrained right to unilaterally decide on the conduct of EIA without consulting the coastal states and in the absence of some sort of standardized guidelines applicable to the specific geographical setting as described herein, then the likelihood of conflicting decisions could arise. In addition to conflicting decisions, adverse impacts upon the national jurisdictions (i.e., ECS) arising from the activity in the ABNJ above them might be ignored altogether. This is not an acceptable outcome. Micronesia is of the view that with respect to the specific geographical setting as described here, for any activity on the water column above an extended continental shelf, the conduct of an EIA should be considered mandatory. Moreover, consultations with the adjacent coastal states, not just information, must likewise be observed.
- It is our view that that the EIA provisions should be fair and equitable. Any unintended effect or interpretation that would make it difficult for Small Island States to participate in the conservation and sustainable use of BBNJ should be avoided. For instance, if States Parties do not have the option of engaging third party experts and consultants to conduct the EIA—subject to the review and approval by States Parties—then it would be difficult if not impossible for Small Island States that lack technical expertise on EIA to perform its duty of diligence. Jurisdictions with capacity constraints, in particular, Small Island States, should be allowed to bring in technical experts to assist them in conducting an EIA according to the applicable standards of the duty of due of diligence. By precluding this option, only the technologically superior jurisdictions would be able to propose and carry out a project or activity on the ABNJ. This is not a fair and equitable outcome.
- Regarding structure and formatting, we could support moving Options A, B and C (p. 37) of Option III(1)(c)(i) to section 5.1. We could also support moving paragraphs l, m, n and o (p. 40—on monitoring and review) to section 5.6.

I thank you.