

**Supplementary views of the Government of the Federated States of Micronesia on the elements of a draft text of 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 following the conclusion of PrepCom 2**

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**Marine genetic resource (MGR): fish and derivatives**

1. FSM supports an internationally legally binding instrument (ILBI) that establishes effective regulation on the conservation, sustainable use and responsible management of all marine living organisms of areas beyond national jurisdiction (ABNJ), whether in the water column, the deep seabed and the subsoil thereof, or anywhere in between.
2. It is the view of FSM that the intent behind an ILBI is filling the undesirable gaps in international law regulation over marine biological diversity of areas beyond national jurisdiction. Filling these gaps entails that an ILBI shall be as comprehensive as practicable, covering areas and activities not adequately addressed by existing international conventions, e.g., the United Nations Convention on the Law of the Sea (UNCLOS) and Convention on Biological Diversity (CBD).
3. Filling these gaps is not intended to undermine existing regional cooperation that states have developed through treaties and conventions, but rather is an attempt to further complement existing regional cooperation. As an example, fish as part of marine biodiversity is relevant to an ILBI to the extent necessary to extract genetic resources; however, due care must be exercised to ensure that an ILBI does not undermine existing fishery regulations, such as measures implemented by regional fisheries management organizations. It is not the intent of an ILBI to subject fisheries to duplicative or conflicting measures, or to cause more burdensome responsibilities upon coastal states, especially Small Island Developing States (SIDS). Accordingly, an ILBI must allow for regional cooperation or organizations to coexist and operate providing conservation and management measures or regimes affecting BBNJ, especially in high seas areas that are bounded by national jurisdictions.
4. FSM is of the view that proper conservation and management measures must include tangible measures that will help mitigate any climate change impacts upon SIDS including FSM.
5. FSM is of the view that MGRs are fittingly considered as common heritage of humankind. Common heritage of humankind principle is based on the notion that certain resources are of particular importance or significance to the prosperity and stability of the international community, e.g., the polymetallic nodules and other non-living resources of the area beyond national jurisdiction (ABNJ) for being critical for the production of certain electronics or technologies needed for modern economic development and health. MGRs in the ABNJ are of similar, or perhaps even more, importance and significance as the non-living resources of the ABNJ; as such, the exploration and exploitation of MGRs should call for similar level of protections as those applicable to the non-living resources in the ABNJ.
6. MGRs consist of nature's bounties for all of humankind. They are not entitlement to a particular state or person, but rather for the benefit of all. These bounties are inheritance not only for the present generation but future generations as well. Intergenerational

- responsibility creates an obligation upon all of humankind with respect to resources that benefit all in an equitable manner.
7. As common heritage of humankind, MGRs require special protection to ensure that they are preserved and properly managed through international regimes that guarantee not only sustainable exploitation of resources but also equitable sharing of benefits.
  8. Equitable sharing of benefits helps eradicate or mitigate poverty and secure resources that support national services.
  9. FSM is of the view that an ILBI must maintain consistency with, and should not subvert or undermine the provisions of, the UNCLOS. UNCLOS must remain its status as the law of the sea.
  10. FSM supports the view that MGR is subject to access benefit sharing (ABS) regime that is realistic and meaningful. To be realistic, an ABS regime must have likelihood of being accepted by developed and developing states, especially by the SIDS like FSM with longstanding historical and cultural connections to, and reliance on, the Ocean's bounty.
  11. FSM is of the view that for an ABS regime to work, it must be supported by a firm commitment of states parties towards sharing of access benefits in a manner that gives tangible consideration to the needs and interests of developing states. Exploitation of MGRs poses environmental threats and many of these threats are not fully understood with present technology. The interests of fairness and equity lean heavily towards sharing of the benefits from access to MGRs in lights of mutual risks from the environmental and ecological hazards arising from the exploitation of these resources.
  12. Some examples of principles governing this sharing of benefit regime are as follows: (1) due consideration accorded to SIDS; (2) impact upon marine ecology and neighboring zones including those under national jurisdiction; (3) differentiated severity of impact upon adjacent states parties; (4) cost of remediation and anti-pollution measures; (5) increase scientific knowledge on conservation of biodiversity; (6) benefits from humane use of derivatives; and (7) not promote or allow the use of derivatives towards destruction or impairment of human life or towards non-peaceful purpose.
  13. FSM supports the principle of adjacency in the sense that high sea pockets created by adjacent exclusive economic zones deserve special attention. Coastal states have greater opportunity, and should be allowed greater role, in conserving, managing, and regulating access to the resources of those high sea pocket areas.
  14. FSM wishes to note UNCLOS' recognition of legitimate interests of coastal states with respect to activities in the ABNJ lying across national jurisdictions. (See, Art. 142: Rights and legitimate interests of coastal States.) With respect to BBNJ, some of the legitimate interests of coastal states proceed from the transboundary nature of the BBNJ resources forming a unitary ecosystem that evades politically demarcated boundaries. As such, BBNJ activities in one part of the ecosystem are expected to have some impacts on other parts, including those within national jurisdictions.
  15. FSM wishes to reemphasize its strong historical and cultural connections to the resources of the Ocean. FSM people's connection to the Ocean is manifested by their mastery of ocean navigation starting from the time of their ancestors who lived on the hundreds of islands of Micronesia. As part of their cultural tradition and way of life, they regularly cruised the vast Pacific Ocean even up to these days, relying upon intimate knowledge of the stars and oceanic creatures to guide them and to give sustenance during their journeys. BBNJ must reflect upon these important cultural aspects of island living to ensure that an ILBI on the BBNJ will not undermine people's culture nurtured by centuries of close contact with the Ocean.

16. FSM is of the view that the ABS regime shall draw from the principles contained in the Nagoya Protocol with respect to knowledge associated with genetic resources and “prior consent” involving indigenous and local communities.
17. Principle of sharing of benefits must be respected, taking into consideration the severe imbalance between developed and developing states (especially SIDS) in terms of their ability to participate in exploiting the benefits from BBNJ.
18. FSM supports a clear commitment to building an ABS fund. The general purpose of the fund can be outlined in an ILBI, whereas detailed mechanics of uses can be provided by protocol.
19. An ILBI must be as comprehensive as possible to include derivatives. Derivatives being the result of the utilization of a genetic resource through human activity, such as research and development, regulatory framework on derivatives must be such as would foster rather than slow down research and development without losing sight of the main principle behind equitable sharing of benefits.

#### **Area based management tools (ABMTs)**

20. FSM is of the view that an ILBI must have provisions on area based management tools that will effectively conserve the fragile living resources of the ABNJ and ensure that their exploitation will occur in a manner that preserves their corpus for the benefit of future generations of humankind.
21. ABMTs must acknowledge and respect efforts by regional and subregional institutions managing certain ABNJs as sanctioned by UNCLOS. FSM takes the view that an ILBI must allow for regional and subregional institutions to operate towards implementing conservation and management measures of BBNJ. An example of measures in place is the “closure” of certain high sea pockets in the Western and Central Pacific Ocean to fishing pursuant to the conservation and management measure of the Western and Central Pacific Fisheries Commission and the Parties to the Nauru Agreement.
22. FSM is of the view that an ILBI is intended to fill in regulatory gaps in international law with respect to BBNJ, and on that basis ABMTs are not designed to compete and undermine, but rather complement existing regulations.
23. FSM supports ABMTs on the understanding that it shall not create or cause disproportionate burden upon coastal states’ ABMTs with respect to the management of their respective EEZ.
24. SIDS that are adjacent to the high seas do have measures in place and have adopted management tools designed to preserve and conserve resources under national jurisdiction. With respect to ABMTs for BBNJ, such should not overburden, or cause any disproportionate burden upon, coastal states.
25. FSM supports the establishment of a permanent scientific committee that assists in the review of ABMTs proposal and oversee their implementation. Key to this process is the reliability and consistency in implementing ABMTs.
26. ABMTs must not undermine existing regulations that are implemented by RFMOs and SRFMOs.
27. FSM supports the establishment of a scientific committee under an ILBI to inform states parties of the character, scope and appropriate placements of ABMTs using best available technology.
28. The role of this scientific committee is to produce guidelines and recommendations on the appropriate ABMTs using best available technology.

29. Key aspect of the role of this scientific committee is to give due consideration to the influence of climate change impacts on the suitable choice of ABMTs.
30. FSM is of the view that ABMTs do not encroach upon continental shelves under national sovereign rights or which fall within the scope of article 76 of UNCLOS.
31. Continental shelves are presently covered by UNCLOS. An ILBI gives consistency to, rather than conflict, the rules governing continental shelves.
32. In order to reassure consistency with UNCLOS, non-party states should be encouraged to undertake best efforts towards becoming states parties to the UNCLOS.

#### **Environmental impact assessment (EIA) including TEIA**

33. FSM is of the view that EIA must reflect upon existing international law principles, including transboundary environmental impact assessment (TEIA).
34. Every activity proposed in connection with the BBNJ must be required to have an EIA. And any proposed activity on the ABNJ that has potential impact upon the resources within national zone is required to have a TEIA.
35. In order to be effective and consistent among activities involving BBNJ, EIA must be mandatory for all proposed BBNJ activities. To avoid any circularity of this requirement, no minimum threshold of impact will be required. Moreover, since BBNJ activities are mostly filled with numerous risks that are not fully understood presently, in the interest of prudence, EIA must be required for every proposed activity.
36. EIA must be conducted in a fair, transparent, consultative, and standardized manner. Present national laws might be insufficient and ineffective for this purpose; therefore, EIA must be governed by globally accepted standards in conducting it, in reviewing its outcome, and in making decisions to approve it.
37. EIA entails the cooperation and involvement of coastal states, especially those states with EEZ adjacent to the location on the high seas where a proposed activity is under review. The EIA process needs broadest possible consultation by providing coastal states with notification of the proposed activity on the BBNJ, consulting their views upon such proposed activity, and informing them of the outcome of the consultation. Full information must be provided not only to the states but also the communities in the coastal states, which have traditional connection to the resources on the high seas.
38. FSM is of the view that since BBNJ does not fall under any country's jurisdiction; therefore, it becomes necessary to establish an international body that will guide in the review of the EIA process. However, in establishing an international body, care must be taken to avoid creating too many subsidiary bodies and incurring unnecessary costs that will overburden states parties.
39. A mechanism must govern the conduct of EIA through uniform guidelines prescribed by an international body that will be responsible in maintaining fairness and transparency in the EIA process.

#### **Capacity building and transfer of marine technology**

40. FSM is of the view that capacity building and transfer of technology are the equitable ingredients with which to reassure developing states that an ILBI is meaningful and acceptable to them, especially to SIDS.
41. Special circumstances and challenges facing SIDS are restricting their ability to participate in decision-making and exploitation of resources of the ABNJ. These circumstances include lack of adequate financial resources to be able to participate in

- meetings and workshops, limited know-how on regulation, conservation and sustainable use of resources, and limited access to BBNJ research and information.
42. Already, UNCLOS calls for capacity building and transfer of technology. An ILBI must maintain consistency with these UNCLOS provisions. Moreover, clear and binding mechanism must be in place to secure capacity building and transfer of technology. Voluntary pledges are deemed to be ineffective to address this need fully.
  43. FSM supports an ILBI that takes extra measure to acquire scientific knowledge relating to BBNJ and which ensures that all states will benefit therefrom. To this end, states shall cooperate in promoting transfer of technology and scientific knowledge on BBNJ so that all states, especially SIDS, will benefit from the BBNJ resources. To achieve this objective, meaningful opportunities must be accorded to personnel from SIDS for adequate training in marine science and technology.
  44. FSM supports the establishment of a clearinghouse mechanism that facilitates information sharing in connection to activities on the BBNJ, particularly (but not limited to) scientific data, research results (especially for MGRs), and best practices.
  45. Capacity building requires public access to information relevant to the conservation and sustainable use of living resources of the ABNJ. Access of information can be carried out through a clearing-house of data. Such access can follow the principles contained in the Aarhus Convention.
  46. FSM supports the establishment of a special fund for capacity building. This special fund will be used for scientific training workshops, scholarships, participation in formal meetings under an ILBI, and other opportunities for nationals of developing countries to learn about BBNJ activities and participate fully in the operationalization of an ILBI.
  47. It is possible to build this special fund from the financial contributions by sponsoring states or private entities proposing to explore and exploit BBNJ resources, and the rates of contribution could depend on considerations such as the size of area involved, type of activities, and risks associated with the proposed activities.

#### **Additional elements**

48. FSM is of the view that an ILBI must establish fund to finance environmental disasters such as pollution and other catastrophic disasters caused by human activities on the living resources of the ABNJ. This fund will complement the ABS mechanism established for MGRs.
49. There should be a mechanism for a financial arrangement that will adequately address contingencies of marine pollution and disaster.
50. Island states are more susceptible to marine pollution and other marine ecological imbalances resulting from disturbances caused to the marine ecology than continental or land-locked states. The potential for such pollution and imbalances must be taken into consideration when crafting an ILBI.
51. FSM recommends the establishing of dispute resolution mechanism. This mechanism will be vested with jurisdiction over disputes over BBNJ matters.
52. A dispute resolution mechanism could be an expansion of the mandate of the International Tribunal for the Law of the Sea (ITLOS) or a new body using ITLOS as model.
53. The importance of the Ocean towards coping with the ill effects of climate change must be recognized in an ILBI, so measures for BBNJ should reflect, not exacerbate or hasten climate change, the urgency of arresting the adverse impacts of climate change especially upon island states.

54. The Ocean serves as stabilizer of the global temperature causing climate change. Activities with potential to cause imbalances on the marine ecology must take into serious consideration the impacts of these activities upon climate change.
55. Due to the much more vulnerable condition of SIDS, including FSM, exposing them to the adverse impacts of climate change, BBNJ instrument must give due consideration to these climate change impacts.