

FIJI'S SUBMISSION FOR BBNJ PREPCOM

INTRODUCTION

1. This paper presents Fiji's initial views coming out of the Second Preparatory Committee Meeting for the "Development 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", on a number of issues, noting that there are other submissions, including that by the Pacific-SIDS and the Group of 77 and China, which speaks at length on substantive and potentially agreeable matters in which Fiji is aligned to.
2. It also recognises the importance of rights and freedoms under UNCLOS and incorporates this in respect to the number of elements discussed.
3. The new Implementing Agreement (IA) would also need to look at how existing Agreements and institutions can come together in order to develop means to ensure that rights and freedoms under UNCLOS, which are instituted and implemented varyingly, do not experience difficulties or unresolvable outcomes arising out of conflict of uses.
4. These are initial views, which will be further developed after a process of more contemplation and study in the margins leading to the third PrepCom.

OVERARCHING OBJECTIVES

5. The new IA should complement what UNCLOS provides and fill areas in which it lacks regulatory/legal, governance or implementation coverage in terms of conservation and sustainable use relating to biological diversity and resources beyond areas of national jurisdiction.
6. We see two, though not limiting, broad objectives that the new IA could include:
 - a. For the conservation and sustainable use of biological diversity of areas beyond national jurisdiction to ensure its long-term sustainability for the benefit of the humankind;
 - b. That the Agreement be interpreted and applied in a manner that does not undermine, is consistent with, or is in magnification of, the 1982 United Nations Convention on the Law of the Sea and its related instruments.

ENVIRONMENTAL IMPACT ASSESSMENTS (EIAs)

7. EIAs should serve to support the overall conservation and sustainable use of biological diversity in the ABNJ. A key word to consider is the word "activities", including its nature, and is in relation to two parts.

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8. The first part relates to the freedom of the high seas: freedoms here comprise, *inter alia*: freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom of overflight.
9. With fast-developing technologies and human capacity to exploit the environment, it can be argued that high seas freedoms may also be at risk of being violated if existing or new activities are left unchecked by EIAs and measures under the new IA.
10. There is a continuous need to assess human actions seeing that there may be existent or future activities that have the potential to threaten the sustainability of activities, for example, fishing. Any activity that is obstructive or detrimental to fishing on the high seas can be seen as a violation of the freedom of fishing. This is part of our understanding of “intra”-boundary context.
11. The second part is the issue of “trans”-boundary impacts. And so, in applying the same example as above, but for areas within national jurisdiction, it can also be argued that any activity that is potentially detrimental to fishing in adjacent boundaries, or other boundaries, is a violation of sovereign rights over fishing. This is our understanding of “trans”-boundary context, where adjacency forms a crucial part.
12. Activities with potentially negative impacts on the environment and biodiversity in the ABNJ are undermining in nature inasmuch as they interfere with these two critical parts: the express freedoms of the high seas under UNCLOS, including fishing, and, the express sovereign rights in Article 56 of UNCLOS for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil.
13. Using the example of fishing, activities that are of a nature to have adverse impacts on the environment, which may resultantly affect fishing and fisheries, are violations of the freedoms of States in the high seas and the rights in exclusive economic zones of adjacent jurisdictions. The main reason for this is because certain activities (current activities or future activities) may be able to create a problem where there is a diminished ability by States Parties to realise, maintain, or develop, such rights, or maybe even a deprivation of rights.
14. Striking the balance between “rights” and “obligations” should have strong consideration for the concept of how rights and obligations are given under UNCLOS and how these comport with the perceived need to ensure that rights and freedoms, and activities therein, do not lead to instances where they undermine each other.
15. To not undermine UNCLOS and its derivatives means to also address the need to develop a framework that looks to bringing together the regulated or partly regulated activities in

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the ABNJ under a collective mechanism for implementing cooperation, noting that there are existing Agreements and institutions with a mandate in ABNJ.

AREA-BASED MANAGEMENT TOOLS (ABMTs), INCLUDING MARINE PROTECTED AREAS (MPAs)

16. The primary objective should be on "conservation and sustainable use" of biodiversity and living resources of areas beyond national jurisdiction.
17. ABMTs will require process leading to decision. The process, in and of itself, will require a proposal before decisions are determined. Decisions on ABMT should recognize ecologically significant/sensitive areas, and/or areas of interest in relation to conservation and sustainable use of biological diversity in ABNJ (Areas of interest).
18. We consider the importance of management measures under ABMTs, and propose more relevant language for this. A consideration is for the use of either of the terms:
 - a. Conservation and Sustainable Measures (CSMs)
 - b. Conservation and Sustainable Use Measures (CSUMs); or
 - c. Conservation and Sustainable Management Measures (CSMMs).
19. CSMs, CSUMs, or CSMMs, should provide agreed targets for achieving broad objectives of ABMTs including MPAs. Nothing in the new IA should prevent RFMOs from establishing their own ABMTs, including MPAs.
20. There should be a different threshold for ABMTs (Partial Closure/Stock Specific/Activity Specific/Full Closure). Decision(s) on ABMTs should partly rest on RFMOs in order to be consistent with regional approach to conservation: RFMOs are mandated to carry out ABMTs, in particular, MPAs.
21. Decisions on ABMTs should be based on scientific data with ABMTs being universal and binding in nature (but limited to areas under the ABMTs). There may be a need for Regular Sessions out of this IA given the changing nature of the oceans and its uses and users.

CAPACITY BUILDING AND TRANSFER OF MARINE TECHNOLOGY

22. We see the need for innovative formulae and to work beyond existing frameworks containing provisions such as "voluntary nature" and "mutually agreed terms" in order for this new agreement to be operational.

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23. There will need to be both mandatory and non-mandatory provisions on capacity building and technology transfer built into this new agreement, similar to other existing instruments and frameworks.

Non-Mandatory Provisions

24. Under non-mandatory provisions the framework for capacity building and transfer of technology in the new agreement, would need to go beyond the current status quo and constraints.
25. We need to consider incorporating a monitoring or follow-up element whereby States Parties are made aware of the progress with respect to the implementation of this provision. The new instrument should also incorporate an obligation on States Parties to fully recognise the special requirements of developing States, including the least developed among them and Small Island Developing States.
26. The precedent is set out in Part 7 of the Fish Stocks Agreement and has been accommodated in other treaties and instruments. The Fiji delegation would like to see in this new agreement a formula for the special recognition of developing States similar to the Fish Stocks Agreement.
27. But to what should such recognition also apply? The new IA should be adherent to what is constituted under UNCLOS and its derivatives. This in mind, we see that there is a fine threshold to be determined with respect to the rights and freedoms associated with this discussion. We consider the following to be recognised into the other considerations on this important element:
- a. Implementation: this partly relates to disproportionate burden, recognising how the PrepCom process should work to developing language relating to the need for a fair framework that recognises States Parties development aspirations, addresses disproportionate burden, for where it is demonstrated to exist, of whatever is agreed to for implementation, and reduces the impacts from any activity in the ABNJ that is known or perceived to have either slight, or vast, proportionate significance on development goals for developing countries, including SIDS;
 - b. Opportunity: that the new IA should also be cognizant of the development aspirations of all Parties, including the least developed among them.

Mandatory Provisions

28. For mandatory provisions, replicating existing frameworks that have worked under the current circumstances is important, specific obligations on Capacity Building & Transfer of Marine Technology can be built into the conditions for access. This example is drawn from the International Seabed Authority model whereby provisions on capacity building

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are included as conditions for the issuance of exploration licenses. This will provide room for flexibility and this way there will be no shortage of "political will" on implementation for as long there is an interest, there will be an opportunity created for Capacity Building & Transfer of Marine Technology

29. Fiji supports the sentiments of other delegations in emphasising the importance of institutional building at the regional, sub-regional and national levels not only for Capacity Building & Transfer of Marine Technology, but also for the management data.
30. Further thought is given to measures for CB & TT, which should also include:
 - a. identifying a set of tangible measures, such as operational guidelines, that are known to or are considered to build human, social, institutional, and economic capacity for States Parties;
 - b. placing these measures within a broader systems framework; and
 - c. exploring stakeholder feedback on specific measures to inform framework implementation

GOVERNANCE AND MANAGEMENT

31. There is the question of governance and management and whether existing institutions or a new institution, or an assimilation of both, should be considered and developed.
32. We note that UNCLOS provides the opportunity for establishing organisations in a regional setting in terms of the organisation possessing the mandates required for giving effect to international Agreements.
33. Article 118 of UNCLOS on *Cooperation of States in the conservation and management of living resources* provides,

“States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.”

34. In this regard, drawing from existing examples of regional organisations, it is perhaps worth considering how a regional organisation, or even a collaboration of organisations, can serve as an implementing or administrative arm of the new IA.

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CROSS-CUTTING ISSUES

Settlement of Disputes

35. The high seas and the Area are to be reserved for peaceful purposes. Although we do not have a strict understanding of what the use of the term “peaceful purposes” might entail, we view that peaceful purposes should include that activities should operate without prejudice to one another.
36. We note Part XV of UNCLOS has provisions for the settlement of disputes. We also note the mention of the UN Charter, Article 33, which further provides for the “Pacific Settlement of Disputes”. These are seen to apply in the case where there is a case regarding a dispute on the “peacefulness” of an activity or undertaking, and involves the Security Council.
37. We consider the provisions under Part XV of UNCLOS, particularly Article 282, on the *Obligations under general, regional or bilateral agreements*, which also relates to procedures agreed by the Parties to such agreements. This in our view also works in support of the idea that perhaps a regional context could work to be the implementing proponent of this Agreement.
38. We also consider Article 197, on *Cooperation on a global or regional basis*, which reads:
- “States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”*
39. Such provisions perhaps exhibit a supportive case for argumentation that positions for having implementation conducted in a regional context. Article 118 establishes Regional Fisheries Management Organisations (RFMOs), and so, further thought should be given to whether biodiversity conservation and sustainable use can be administered or governed by regional bodies.
40. Article 30 of Fish Stocks Agreement provides procedures for which a rendition suited to the new IA could be made.

POSSIBLE FUNCTIONS OF AN INSTITUTIONAL FRAMEWORK

41. Fiji supports the submission on ‘institutional arrangement proposed by the Pacific Small Islands Developing States (PSIDS).

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MANAGEMENT OF BIOLOGICAL DIVERSITY

42. States and all those engaged in management of biological diversity should, for areas under the Agreement, adopt harmonised measures for the long-term conservation and sustainable use of biological diversity.
43. Such measures, whether at sub-regional, regional, or global levels, should be based on the best science available and be designed to ensure the long-term sustainability of biological diversity and biological resources at levels which promote the objective of their conservation and sustainable use and maintain, without compromise by short term considerations, their availability for present and future generations.
44. States, in possessing the freedoms entailed under the Convention, should collaborate with a view to establishing regional organisations, or a council of organisations, with a mandate to administer and coordinate the various activities to ensure conservation and sustainable use.
45. Where any interest or activity exists, States Parties, particularly adjacent States, should cooperate to ensure effective conservation and sustainable use of biological diversity. This should be achieved, where appropriate, through the establishment of a subregional or regional organisation or arrangement.
46. A subregional or regional organisation or arrangement should include representatives of States in whose jurisdictions the biological resources in areas under the Agreement are adjacent to.
47. Where a subregional or regional organisation or arrangement exists and has the competence to establish conservation and sustainable use measures, States Parties to the Agreement, should be required to become a member of such organisation in order to effectively cooperate in such organisation or arrangement, and actively participate in its work.
48. A State Party which is not a member of a subregional or regional organisation or arrangement or is not a participant in a subregional or regional organisation or arrangement should nevertheless cooperate, in accordance with relevant international agreements and international law, in the conservation and management of the relevant fisheries resources by giving effect to any conservation and management measures adopted by such organization or arrangement.
49. Representatives from relevant organisations, both governmental and non-governmental, concerned with biological diversity beyond areas of national jurisdiction should be afforded the opportunity to take part in meetings of subregional and regional organisations and arrangements as observers or otherwise, as appropriate, in accordance

To: doalos@un.org

with the procedures of the organisation or arrangement concerned. Such representatives may be given timely access to the records and reports of such meetings, subject to the procedural rules on access to them.

50. States should establish, within their respective competences and capacities, effective mechanisms for monitoring, surveillance, control and enforcement of their entities operating in areas beyond national jurisdiction to ensure compliance with their conservation and sustainable management measures, as well as those adopted by subregional or regional organisations or arrangements.
51. With respect to utilisation of biological diversity in areas beyond national jurisdiction, States should take measures to prevent or eliminate excess capacity and should ensure that levels of effort by entities involved are commensurate with the sustainable use of biological diversity as a means of ensuring the effectiveness of conservation and sustainable management measures.
52. States and subregional or regional biological diversity management organisations and arrangements should ensure transparency in the mechanisms for management and in an agreed decision-making process.
53. States and subregional or regional biological diversity management organisations and arrangements should give due publicity to conservation and sustainable management measures and ensure that laws, regulations and other legal rules governing their implementation are effectively disseminated. The bases and purposes of such measures should be explained to users of biological diversity and its resources in order to facilitate their application and thus gain increased support in the implementation of such measures.

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