



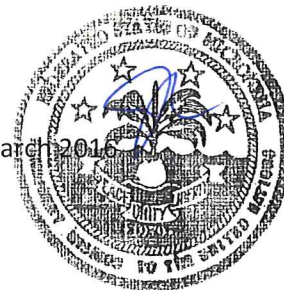
PERMANENT MISSION OF THE FEDERATED STATES OF MICRONESIA
TO THE UNITED NATIONS

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The Permanent Mission of the Federated States of Micronesia to the United Nations presents its compliments to the Permanent Mission of the Republic of Trinidad and Tobago to the United Nations, and has the honor to submit a paper containing the 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, pursuant to an invitation contained in a letter dated 18 December 2015 from H.E. Mr. Eden Charles of Trinidad and Tobago, Chair of the Preparatory Committee established by United Nations General Assembly resolution 69/292.

The Permanent Mission of the Federated States of Micronesia to the United Nations avails itself of this opportunity to extend to the Permanent Mission of the Republic of Trinidad and Tobago to the United Nations the assurances of its highest consideration.

New York, 14 March 2016



Permanent Mission of the Republic of Trinidad and Tobago to the United Nations
NEW YORK, NEW YORK

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

Submitted: 14 March 2016

Introduction

1. In a letter dated 18 December 2015, H.E. Mr. Eden Charles of Trinidad and Tobago, Chair of the Preparatory Committee established by United Nations General Assembly resolution 69/292, invited delegations to submit views on the elements of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ instrument). The Government of the Federated States of Micronesia (FSM)—a Member of the United Nations and a State Party to UNCLOS—welcomes this opportunity to present its views in response to Ambassador Charles’s invitation. This paper discusses the FSM’s views on the four issue areas comprising the so-called “package deal” adopted by delegations in 2011 as necessary elements of a future BBNJ instrument. This paper also discusses additional elements related to the four issue areas of the 2011 package deal.
2. As a preliminary matter, the FSM notes that as a small island developing State (SIDS) with a sizable exclusive economic zone (EEZ) abutting several expansive areas beyond national jurisdiction (ABNJs) in the Pacific Ocean, the FSM has moral (if not legal) standing to advocate for and ensure the proper conservation and sustainable use of the rich marine biological diversity of ABNJs for the benefit of present and future generations of humankind. When the ancestors of the indigenous people of the FSM first settled the hundreds of islands and atolls of the FSM centuries ago, they did so through brave, harrowing seafaring voyages across the vast Pacific Ocean. Using the stars, waves, and the creatures of the Ocean as guides and sources of sustenance, the ancestors of the people of the FSM voyaged where few had ventured before and began a new era of human civilization in the Pacific. The people of the FSM are people of the Ocean. The Ocean is our most precious natural resource, our guardian and guide, and our ancient heritage which we are obligated to protect and bequeath whole to future generations. A robust, far-reaching BBNJ instrument will be a central component for honoring that fundamental obligation.
3. As an additional preliminary matter, it is the FSM’s view that the BBNJ instrument must regulate the conservation and sustainable use of all marine biological diversity of ABNJs—whether in the water column, the deep seabed and the subsoil thereof, or anywhere in between. However, such regulations must not undermine existing regulations of fish stocks of ABNJs, particularly (but not limited to) highly migratory and straddling fish stocks currently regulated pursuant to the 1995 United Nations 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 Sustainable Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

4. As a necessary corollary, it is the FSM's view that the BBNJ instrument must not disturb existing regulations of nonliving resources in the Area by the International Seabed Authority, pursuant to Part XI of UNCLOS. Although the BBNJ instrument will regulate living resources of ABNJs, such resources do not exist in a vacuum, but instead coexist with nonliving resources deemed by the international community to be the common heritage of humankind. The separate regulatory systems must complement rather than undermine each other's important work.
5. As a final preliminary matter, it is the FSM's view that the living resources of ABNJs are the common heritage of humankind, deserving of coordinated conservation and sustainable use by the international community lest the resources are forever depleted. This designation extends to marine genetic resources of ABNJs, in light of their potential for providing important benefits for the health and livelihoods of all humankind for generations to come if properly studied and sustainably exploited. The sole exception to this designation among the living resources of ABNJs is fish, but only to the extent that existing international, regional, and subregional instruments, institutions, and other regulatory entities do not currently allow for such a designation to attach to the fish stocks they regulate.

Marine genetic resources, including access and benefit sharing

6. It is the FSM's view that marine genetic resources (MGRs)—being the common heritage of humankind and a key component of the marine biological diversity to be regulated by the BBNJ instrument—must be subject to an access and benefit sharing (ABS) regime that is robust, equitable, and properly attuned to the needs and interests of developing countries. The sharing of benefits accruing from access to and exploitation of MGRs of ABNJs is essential to ensuring that the BBNJ instrument will be acceptable for SIDS like the FSM with longstanding historical and cultural connections to, and reliance on, the Ocean's bounty. Although it is challenging at this stage to conceptualize the scope and character of an ABS regime for MGRs under the BBNJ instrument, there are a number of possible elements for consideration. For example, the BBNJ instrument can allow developed country Parties to sponsor exploration and exploitation of MGRs of ABNJs by private contractors—similar to the exploration and exploitation of nonliving resources in the Area—in exchange for financial contributions by those Parties and/or contractors to an ABS fund, which will then be disbursed in an equitable manner to BBNJ States Parties. The BBNJ instrument can also encourage developing country Parties to sponsor private contractors as well, in exchange for granting those developing country Parties preferential access to the ABS fund. The sizes of financial contributions from developed country Parties may be based on a flat rate, or be proportionate to the geographical scope of the ABNJs to be explored and/or exploited by the private entities they contract. The BBNJ instrument can prohibit access to MGRs—including any benefits that accrue from their exploration and exploitation—that does not comply with this ABS regime.
7. The study of MGRs is a cutting edge field, and as such, it is subject to competing and complex intellectual property (IP) considerations. It is the FSM's view that the Ocean must be an open source for research innovation and solutions for the ills and challenges of humankind, particularly the living resources of ABNJs. Although discoveries and commercial innovations are encouraged with regard to MGRs of ABNJs, such

innovation should not cater exclusively to profit motives, but should instead respect the common interest of humankind in benefitting from the sustainable use of such MGRs. Discoveries among living resources of ABNJs that are useful for the further preservation of biodiversity and MGRs should not be beholden to exclusive rights of discrete private entities or individuals. IP rights should not be applied with such rigidity in pursuit of exclusively commercial ends that they preclude the use of the targeted living resources to ameliorate some of the common concerns of humankind. Thus, it is the FSM's view that any IP rights that attach to MGRs of ABNJs under the BBNJ instrument must be secondary to the entitlements of the international community that flow from the designation of MGRs as the common heritage of humankind. An ABS regime for MGRs of ABNJs must reflect this treatment of IP rights.

8. It is the FSM's view that indigenous communities in coastal States who possess special knowledge about living resources of ABNJs should be afforded special consideration under any ABS regime for MGRs under the BBNJ instrument. For example, as noted in paragraph 2 of this paper, the ancestors of the current indigenous inhabitants of the islands and atolls of the FSM navigated the wide expanse of the Pacific Ocean using, among other things, the creatures of the Ocean as guides and sources of sustenance, based on ancient knowledge about their behavior patterns and nutritional values. In ABS regimes under 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 (CBD), entities wishing to access biological diversity under the jurisdiction of a CBD Contracting Party must first secure the informed consent of indigenous communities in the jurisdiction who are considered custodians of that biological diversity. Similarly, for the BBNJ instrument, it is the FSM's view that an entity wishing to study, explore, and/or exploit MGRs in a particular ABNJ must at the very least consult the indigenous communities of the coastal States whose EEZs abut that ABNJ prior to commencing their engagement with the MGRs. The ABS regime for the MGRs can also prioritize those indigenous communities in terms of receiving benefits from the regime, including benefits from the aforementioned ABS fund.
9. It is the FSM's view that access to MGRs under the BBNJ instrument must be confined to non-military and peaceful purposes only. This is consistent with Article 88 of UNCLOS reserving the high seas for peaceful purposes. Allowing entities and States Parties to develop life-threatening military implements using MGRs will be a direct violation of the notion that MGRs and other living resources of ABNJs are the common heritage of humankind.

Area-based management tools, including marine protected areas

10. It is the FSM's view that the heart of the BBNJ instrument must be the design, implementation, and enforcement of area-based management tools (ABMTs) that truly conserve the fragile living resources of ABNJs and ensure that their exploitation will occur in a manner that preserves their corpus for the benefit of many generations to come. Existing management tools in maritime areas are typically sectoral, i.e., focused on particular resources or activities. This is too limited of an approach. The BBNJ instrument must employ management tools that encompass discrete maritime *areas*—i.e., an ecosystem approach rather than a resource- or activity-specific approach. By regulating the ecosystems of maritime areas, ABMTs will necessarily also regulate

activities and resources within those ecosystems, thereby achieving objectives of sector-based management tools while also properly managing the relevant ecosystems from destructive activities not otherwise regulated under sector-based management tools.

11. In providing for ABMTs of ABNJs, the BBNJ instrument must take heed of a number of factors and considerations. First, because of the potential for ABMTs to have differentiated impacts upon coastal and non-coastal States, the BBNJ instrument must avoid imposing disproportionate burdens on coastal States—particularly SIDS like the FSM—through the implementation of ABMTs, especially ABMTs that regulate living resources that are crucial for the livelihoods of developing country coastal States and that range between ABNJs and the maritime areas of those coastal States. Second, the BBNJ instrument must respect existing ABMTs imposed by coastal States in their own maritime areas abutting ABNJs, so that ABMTs of ABNJs do not undermine the economic and political interests pursued by those coastal States through their own ABMTs. Third, the BBNJ instrument must acknowledge and respect efforts by regional and subregional instruments and institutions to manage certain ABNJs—e.g., the “closure” of certain high seas pockets in the Western and Central Pacific Ocean to fishing, pursuant to conservation measures and regulations by the Western and Central Pacific Fisheries Commission and the Parties to the Nauru Agreement.
12. In determining where to site ABMTs and how to enforce them, the BBNJ instrument must employ the precautionary principle and rely on the best scientific information available about the health of the living resources in the areas subject to the ABMTs. Toward that end, the FSM proposes the use of a permanent scientific committee or similar body that will compile scientific data about MGRs and other living resources of ABNJs. Such a compilation will inform the placement, character, and scope of ABMTs. The proposed scientific committee or similar body can be an existing entity or a creation of the BBNJ instrument.

Environmental impact assessments

13. While ABMTs are crucial to the success of the BBNJ instrument, the instrument cannot be viable without providing for some degree of study, exploration, and exploitation of living resources of ABNJs. To ensure that such activities will not irreparably harm the marine environments in which they occur, it is the FSM’s view that the BBNJ instrument must mandate comprehensive environmental impact assessments (EIAs) prior to the commencement of any legitimate activities of ABNJs that may significantly affect the quality of the marine environments in the ABNJs. The BBNJ instrument must establish an EIA process that, among other things, assists the States Parties to the BBNJ instrument and their general populaces to understand the scope of the activities triggering the EIAs and take steps under the BBNJ instrument to protect, restore, and enhance the maritime environments potentially affected by those activities. Toward that end, EIAs must be transparent and as inclusive of public input as possible, especially input from the States Parties to the BBNJ instrument as well as regional and sectoral stakeholders. To ensure full public participation in the EIA process, the BBNJ instrument can draw on principles in, for example, the Aarhus Convention on access to information, public participation in decision-making, and access to environmental justice matters.

14. It is the FSM's view that the core of an EIA under the BBNJ instrument must be an environmental impact statement (EIS). An EIS can include a summary that briefly describes the proposed activity and its possible environmental consequences; a description of the proposed activity's objectives as well as its technical, economic, and environmental characteristics; an identification of the precise location and boundaries of the proposed activity shown on a reliable, detailed map or other cartographical instrument; a description of the environment in the vicinity of the proposed activity before its commencement; a discussion of the environmental consequences of alternatives to the proposed activity and a comparison of those consequences to those projected for the proposed activity; and a complete listing of all the entities and individuals consulted in the preparation of the EIS. The BBNJ instrument can also allow multiple entities to participate together in the EIA process, especially if their proposed activities will occur in adjacent locations of ABNJs.
15. It is the FSM's view that the BBNJ instrument, in fashioning an EIA process, must endorse the precautionary principle and the employment of the best available scientific information. Entities conducting EIAs must be forthright about any uncertainties surrounding the possible environmental consequences of the proposed activities in ABNJs. Similarly, the body that administers the EIA process must err on the side of caution when determining whether to approve proposed activities in ABNJs. The work of this administrative body can employ compilations of scientific information prepared by the permanent scientific committee or similar body proposed in paragraph 12 of this paper.
16. It is the FSM's view that the BBNJ instrument must provide for the use of transboundary environmental impact assessments (TEIAs). A TEIA will address a proposed activity whose environmental effects will likely straddle an ABNJ and an adjacent EEZ. By necessity, a TEIA will be employed only in a situation in which the proposed activity potentially affects the maritime environment of a State Party to the BBNJ instrument (as well as the environment in an adjacent ABNJ). The TEIA can rely on the compilations of scientific information prepared by the permanent scientific committee or similar body proposed in paragraph 12 of this paper.

Capacity building and transfer of technology

17. It is the FSM's view that the BBNJ instrument must contain robust provisions on building the capacities of SIDS like the FSM to study, manage, and sustainably exploit living resources of ABNJs. A key aspect of capacity building is public access to information relevant to the conservation and sustainable use of living resources of ABNJs. To combat the information asymmetries that undermine efforts by developing countries to fully benefit from the study, exploration, and exploitation of living resources—particularly those requiring intensive research and steep financial costs—the BBNJ instrument can establish a central repository or information clearing-house for data regarding living resources covered by the BBNJ instrument, especially (but not limited to) MGRs. States Parties to the BBNJ instrument—including localities and private entities therein—can have free and full access to such an institution for sanctioned purposes. Such access can follow the principles contained in the Aarhus Convention, as noted in paragraph 13 of this paper.

18. The BBNJ instrument must also establish a fund—or perhaps draw on the ABS fund proposed in paragraph 6 of this paper—that finances the participation of SIDS States Parties in major meetings under the BBNJ instrument (including, but not limited to, annual Meetings of States Parties to the BBNJ instrument); as well as scholarships or other grants for representatives from SIDS States Parties to participate in workshops, programs, and other official training opportunities organized pursuant to the BBNJ instrument to develop relevant capacities for those States Parties.
19. In terms of transfer of technology, it is the FSM’s view that the BBNJ instrument’s provisions for transfer of technology must prioritize the needs and interests of SIDS like the FSM that have limited technological resources suitable for participating in the BBNJ instrument’s regulation of living resources of ABNJs, particularly the sustainable use of those resources. Robust transfers of technology from the developed world to SIDS like the FSM will encourage broader and deeper participation of developing countries in the important work of the BBNJ instrument, as opposed to tilting the scales in favor of developed countries benefitting from technological imbalances. Technology for studying and developing MGRs will be particularly crucial under the BBNJ instrument.

Additional elements

20. It is the FSM’s view that the BBNJ instrument must establish a fund that finances efforts to repair the harmful effects of pollution and other catastrophic human activities on the living resources of ABNJs. This rehabilitation and remediation fund can complement or be the same as the ABS fund established for MGRs, as proposed in paragraph 6 of this paper, much like the fund under the International Maritime Organization to which oil tankers contribute in order to address massive oil pollution incidents.
21. It is the FSM’s view that the BBNJ instrument must provide for a discrete mechanism for adjudicating disputes regarding the interpretation and application of the instrument. The instrument can establish a new dispute resolution mechanism or employ the mechanism under UNCLOS, including the services of the International Tribunal for the Law of the Sea (which can, in the alternative, be the model for a new mechanism).