



BIOLOGICAL DIVERSITY BEYOND NATIONAL JURISDICTION

PACIFIC NEGOTIATORS MEETING

26 – 28 February 2020

Forum Secretariat, Conf Room A

Suva, Fiji



MEETING BRIEFS

SESSION 1

Interests of coastal states/Adjacency

Facilitators: Ms. Siai Taylor (Cook Islands) & (PIF, Filimon Manoni)

1. Understanding from previous PIF BBNJ meeting

For PIFS membership, the concept that certain delegation capture as “adjacency” reflects the need to take into account the particular interests of coastal states to what is done in ABNJ adjacent to their EEZ. In short, whatever happens in ABNJ adjacent to an EEZ can have implications for that EEZ, including measures taken in this EEZ, as well as in relations to the interests and sovereign rights of the coastal State.

2. How the issue is reflected in the 0-draft

Adjacency or the consideration of the interests of coastal states is not as well reflected in the revised 0-draft than the IGC3 version. The term “adjacency” still causes uneasiness among certain delegations. There is much room for the concept to be further reflected, in particular in the context of EIA and provisions of CBTT as well as benefit sharing.

Adjacency or interests (as well as role) of coastal states adjacent to an area in ABNJ is not reflected in the Preamble or article 5 on principles and approaches.

Recognition of adjacent coastal states is also missing in article 6 despite proposals made during IGC3. Suggestions were also made in article 6 to add new para including as regard coordination mechanisms that can take into account ACS (Adjacent Coastal States).

In the MGR section, ACS are included as possible beneficiaries of common funding pool to participate in research cruises (article 11.4.c) but this para is bracketed. There is nothing else on ACS in the MGR section.

For ABMTs, there are few references. Article 15.4 provides for measures in ABNJ to not undermine the effectiveness of measures adopted by coastal states, which may seem that it is attempting to operationalize compatibility. If so, may need to be redrafted to only focus on areas within national jurisdiction whereby measures taken in ABNJ should be compatible with those within NJ to not undermine their effectiveness. An indirect reference to adjacency is included in article 15.5 whereby if part of an ABMT falls under NJ of a coastal state, then it should either be



adapted or cease to be in force. Furthermore, article 17 on proposals: para 4c: proposals to include information on specific human activities in the area, including from IPLC from adjacent coastal states (4c) and information on any consultations with ACS (meaning that prior to submitting proposals, consultations with ACS would be encouraged – para 4i)). Para 2 of article 18 also include reference to ACS, but some delegations suggested that reference be including as soon as para 1 (supporters: PSIDS, Australia, Canada, Monaco, CLAM). Others (Norway and Singapore) prefer “affected states”. This needs to be appraised with caution as it could include distant water states that have activities in the area but are not adjacent coastal states. On para 2.a, the 0-draft describes what ACS should be invited to submit and this might be too much details to discuss (see further questions). Annex 1 includes indirect references to adjacent coastal states: ecological connectivity (n) and transboundary impacts (q). Missing from ABMT: keeping ACS informed of monitoring and review of the ABMT. In article 48, already provision to keep ACS informed of decision by COP but silent on reports.

For EIAs, ACS are indirectly referred to as regards transboundary impacts (article 26.2) as well as in regard to vulnerable or significant areas (article 27.2; article 30.2). References to ACS in the consultation process (article 34) are all bracketed: para 2 lists ACS as potentially affected States but ACS are in bracket. Also, in bracket are adjacent communities and organizations (isn’t that too complex and burdensome to include them?) as well as IPLC with relevant TK in ACS. The provision to have targeted and proactive consultation and notification to adjacent SIDS is also bracketed (para 3) and there is no reference to other types of ACS (opposed by Russia, Switzerland, RoK, Philippines). On comments received by ACS to be addressed/responded to (para 4), ACS are also bracketed (opposition by CARICOM, Singapore, US, Switzerland). Article 35.2 on the assessment report refers to transboundary impacts (d) but nothing on ACS particular, which may make sense if it is already included in either the location (a) or the marine environment likely to be affected (c) or in the methodology used to identify environmental impacts (m). Article 36 omits any reference to ACS in with reports to be just published. In terms of “communication” of the report, the text is bracketed, and no specific information is given on whom it should be communicated to. Article 38 on decision-making does not include any reference to ACS in particular in terms of their views and concerns as expressed during the consultations. Article 40 on reporting does not provide specifically for the report to be shared with ACS (in the spirit of continuing with proactive consultation). However, a bracketed provision in that effect is included in article 41.

The part on CBTT does not include direct reference to ACS.

Institutional arrangements: Article 48.3ter provides for decisions of the COP to be transmitted to ACS. However, reference to ACS is bracketed and so is the entire paragraph. The only provision on ACS as regard the scientific and technical body (STB) is indirect with the STB to collaborate with regional/subregional capacity building committees or regional needs assessment mechanism (a.49.4j)? In the very detailed clearinghouse mechanism article 51, ACS are indirectly included in the link with existing regional or subregional CHMechanisms (article 51.40.d).

Reference to ACS in the financial provisions is also slim with only one referring to funding to support public consultations at subregional levels (article 52.5.f) and it is unclear whether “public consultations” refers to ACS or other stakeholders.



3. Guiding questions to aid discussions

- a) How would we define adjacency? I.e, how far from an activity or project must a coastal state be to be identified as ACS in the future instrument?
- b) Are the current draft provisions, including those in brackets, the most effective to get in the treaty to support the interests of the Blue Pacific? If so, what should be the strategy to consolidate these provisions?
- c) In ABMTs, should there be mandatory consultations with ACS prior to the submission of the proposal? Or is it enough to have consultations after the proposal has been submitted to inform the decision making?
- d) In EIA, do we need consultations with ACS during the scoping phase? Should there be a specific provision (article 38) to ensure that views of ACS as expressed during consultations are taken into account when making the decision (by COP or the flag state)?
- e) Discussion to have perhaps during the SEA: the role and consideration of ACS?
- f) In terms of benefit sharing from the utilization of MGR and CBTT, should there be specific provisions for ACS? Or should there be any specific provisions, should these be only to adjacent SIDS? How would these be operationalized?



SESSION 2

Special circumstances of SIDS

Facilitators: Mr. Sylvain Kalsakau (Vanuatu) & (SPC, Molly Powers)

1. Understanding from previous PIF BBNJ meeting

Already in the previous 0-draft, PIF members expressed the need to strengthen how the special circumstances of SIDS is to be reflected in the ILBI (compared to how it is now in the 0-draft). It was understood that the special circumstances of SIDS should not be limited to the Capacity Building and Transfer of Technology section. Rather, it should be included and considered throughout the BBNJ ILBI.

There were also discussions on disproportionate burden. A suggestion was made to look at existing language in other instruments, including the UNFSA and the PSMA (in particular the ad-hoc working group) to find how it could be reflected in the future BBNJ ILBI to give it more teeth.

2. How the issue is reflected in the 0-draft

The special circumstances of SIDS, despite some support on the floor from PIF membership, is poorly reflected in the revised 0-draft.

The special circumstances of SIDS is neither reflected in article 5 on principles and approaches nor in the preamble. The best option would be to include it in article 5 but it seems unlikely, so the best alternative would be a reference in the preamble as well as operational provisions in the different sections of the 0-draft.

No mention of the special circumstances of SIDS in the MGR section.

In the ABMT section, article 20.3 on implementation provides to not impose disproportionate burden on SIDS directly or indirectly. This draft provision is bracketed. There was a suggestion to bring this language closer to the UNFSA language, which could be a solution if opposition grows.

For EIAs, while there are some encouraging signs, all the references to SIDS are bracketed. Article 32.2 provides for the possibility of SIDS to conduct joint impact assessments, although “small island” is currently in brackets and runs the risk of deletion (suggested by EU and Indonesia). While SIDS are not directly identified as stakeholders in the consultation process (article 34.2), there is a bracketed proposal for “targeted and proactive” consultation when involving SIDS. This is opposed by a few delegations and could run the risk of being deleted without strong support (article 34.3). Lastly, article 41.4 provides for ACS and SIDS to be kept informed/consulted actively in the monitoring, reporting and review processes. However, SIDS is in brackets and this para is also in brackets. The EIA section is missing any specific identification on how SIDS could be supported in the assessment or assessment to support adequate decision making (whether by the COP or the State). It does, however, suggest the creation of a pool of experts to support the STB as well as States parties with capacity constraints (article 32.4). This para is also bracketed.

If there is one section where the special circumstances of SIDS ought to be recognized is in the CBTT. However, it is not in a good shape because SIDS are competing with a lot of categories of developing countries.

Article 42 on objectives misses a provision on SIDS and LDCs. Article 43.3 speaks of giving developing countries full recognition of their special requirements. However, since SIDS are



grouped with other categories of developing countries, this provision is not necessarily conducive to recognizing the special circumstances of SIDS. A stand-alone paragraph on the special circumstances/case of SIDS would be preferable (see AOSIS proposal for alt 3 or as a 43.3bis).

Similarly, modalities for CBTT also include reference to SIDS as recipients but grouped in with many other categories of developing countries (article 44.1). The provision on the responsiveness of CBTT to the needs and priorities of developing states parties including through needs assessment (article 44.4) could be an indirect support to stronger SIDS special circumstances recognition. However, it will depend on what the needs assessment ends up being¹.

SIDS are also referred in article 47.5. However, this article could be strengthened to indirectly cater to the special circumstances of SIDS by providing that those on the receiving-end of CBTT would, at the very least, be consulted during the monitoring and review. This is particularly important if the review is conducted outside of the region and the recipients are not included.

Institutional arrangement articles are also very light on SIDS. There could be specific provisions added to article 48.3ter for instance with the addition of “SIDS and LDCs” after ACS, the argument being their special circumstances and difficulties to constantly abrupt of meeting decisions in particular if their participation is inhibited by absence of funding, such as trust fund depletion.

The clearinghouse mechanism article (article 51.5) suggests the recognition of the special circumstances of SIDS. This paragraph is in brackets. It also includes archipelagic states (which are in brackets) and there are some opposition to the “facilitate access” provisions.

On funding or financial resources, specific provision for SIDS, in light of their special circumstances, is missing. It was suggested in the past that a specific envelope (or specific procedures) for SIDS be provided, which becomes more relevant as SIDS as grouped with all developing countries categories. A suggestion is to consider a provision similar to article 21.6 of the Port State Measures Agreement.

There is no reference to SIDS in part VIII and subsequent sections.

3. Guiding questions to aid discussions

- a) What are the minimum provisions that would be beneficial to SIDS in this instrument?
- b) Some delegations had indicated in the past that for SIDS, in light of their special circumstances, provision of CBTT that could be applied for activities within national jurisdiction and not just for activities in ABNJ, should be promoted. Would a provision similar to article 3.3 of UNFSA be considered?
- c) Is there a role for IPR to either support or on the contrary inhibit adequate provision of CBTT to SIDS?
- d) If decision making, implementation, monitoring, enforcement and compliance are all under the purview of the State, could that create some disproportionate burden on SIDS?

¹ Note that IOC is also interested in carrying out a global oceanographic needs assessment under the UN Ocean Decade. We welcome this, but it is worth noting that starting in 2016 in the Pacific SPC has conducted a broad-brush capacity mapping of ocean data needs, national ocean stakeholder information and ocean forecast requests (Maritime, Search & Rescue, Fisheries, Tourism...) in all PICs and more detailed mapping in Fiji, Vanuatu, Tuvalu, Tonga, Samoa, RMI, Niue, Solomon Islands, & Cook Islands- PNG in March 2020. These are by no means comprehensive, but would serve as a strong starting point for a capacity baseline or needs assessment template. Let me know if further info is required.



SESSION 3 Interests and Roles of TK Holders

Facilitators: Olive Vaai (Samoa) & Frances Vaka'uta (USP)

1. Understanding from previous PIF BBNJ meeting

Two important entry points for TK made at the previous PIF BBNJ meeting were that: (1) TK inclusion could be supported by elements of connectivity, passive mobility, and traditional navigation; and, (2) TK should be considered as a complement to rather than a subset of science. In relation to this, there was consensus on the use of the phrase: “based on best available scientific information and traditional knowledge” to consistently highlight the complementarity between TK and science throughout the instrument. Although TK was captured in the President’s draft text for IGC3, there were discrepancies to be addressed. While the instrument identified Indigenous Peoples and Local Communities (IPLC) as holders of TK, it was further recommended that inclusion of TK language in the preamble could strengthen the TK and IPLC position. Other issues discussed included linkages between BBNJ ILBI and Nagoya Protocol and associated knowledge of MGR in national jurisdiction and those in areas beyond national jurisdiction, as well as, how prior informed consent should be considered. The issue of institutional arrangements such as COP, the Scientific and Technical Body and possible TK representation was raised along with the view to avoid leaving too many decisions to the COP unless there was clarity around its role and operational function.

2. How the issue is reflected in the 0-draft

Treatment of TK of IPLC is fairly good but instances exist where language proposed may undermine other interests. The *foundational reference points* for TK of IPLC include preambular language around *stewardship* and on behalf of *present and future generations*, important for TK and IPLC complementarity with other underpinning values of conservation and sustainable use of Ocean resources. Language around guiding principles is significant and PIF members position on use of “*best available scientific information and relevant TK of IPLC*” is important but will need to be mitigated against EU and Russia support of “use of best available science” [5(i)].

EIAs and SEAs should capture “*cultural and human health impacts*” and “*potential impact on ecological, social and cultural values*” but there is also value in considering the difference between cultural values and cultural practices to establish a shared common position on the consistency of use across the instrument. Because of the tension around obligation to conduct EIAs and SEAs, definition of Marine Environment ought to capture culture and heritage and make a case for inclusion of *social, cultural and economic impacts* as defined in the SPREP EIAs guidelines. Although SEAs is recognized as a useful tool for identifying natural, cultural and resource values of an area it is not supported by Ecuador, China, Norway and Japan and while Republic of Korea and USA note it is useful, they oppose its inclusion in BBNJ. [7(alt#1), 13, 22, 28]

Clarity is needed around what counts as *Marine Technology* and *Transfer* of Marine Technology under CBTT. This relates to Annex 2 which includes TK. PIF members should consider the entry point that this language provides leading into CBTT (Section 5) and the recognition of



indigenous technologies and methodologies. Clearer terminology at the onset may allow for better negotiation of benefit sharing. [11, 14, Annex 2, b(iii), 43(2)]

Positively, there is potential for two-way sharing with inclusion of relevant TK of IPLCs in CBTT. The MGR proposal by PIF members, Norway, and Maldives also articulates a strong TK of IPLC position highlighting “*prior and informed consent*” and *access* to “TK on mutually agreed terms”. Compensation for access to relevant TK of IPLC should not be considered as a complementary mechanism to IPR of Western Scientific Knowledge. The risk of open access is problematic as public domain access is not in the interest of IPLC. This needs to be captured in COP functions or subsidiary levels of governance and in the CHM which is currently framed as “*an intermediary to facilitate access to TK*”. In relation to the function of CHM on TK associated with MGRs of ABNJ, there is opposition by Korea and reluctance from Canada around concerns of impact on interests of holders of TK. Although, “*prior informed consent*” suggests IPLC will have a say, the basic principle/ value of safeguarding TK/TEK in perpetuity for the benefit and use of IPLC comes into question if CHM has the authority to provide access to TK through its “*lists of databases or repositories*”. This issue also emerges elsewhere such as in voluntary reporting, publication of assessment reports and disclosure of TK uses at proposal stage. [46(1), 10bis, 12, 51(b), 47(5), 35(2), 35(3), 17(4)]

Implications of current phrasing “*specific human activities in the area, including uses by IPLCs in adjacent coastal states*” will be clearer with definition of COP/Scientific and Technical Body roles and authority and proposal guidelines. Although it reads well to call for submissions on the merit of proposals, questions remain about issues relating to the finer details of COP and CHM. The word “*invited*”, however, at least allows for choice by IPLCs. [17(4), 18(2c.iii)], 48, 49, 51]

On ABMT including MPAs, the objective to support food security, socio-economic objectives and *protection of cultural values* could be used to legitimize short term extractive interests which contradict conservation principles. The use of cultural values here could validate exploitative agendas, including of those who argue for TK held by the State rather than IPLCs. Possible strengthening by adding “*Cultural values and rights*” and considering values vs. practice. PIF members should consider Canada position to include “*other effective conservation measures*”. Generally, it is noted that there is an improvement of language around TK but use of the term *protection* is not well supported. [14(f), 16(1)]

Consistency in language is important. Scoping makes reference to both TK and cultural impacts which is positive, but public notification to potentially affected states and IPLC does not include requested mention of “*in particular SIDS*”. Whereas, some delegations oppose listing, due care is needed to maintain “IPLC with relevant TK” and not just TK. There is also a need for consistency in use of “*best available scientific information and relevant TK of IPLC*” except in relation to CHM where the reference is made to experts. A suggested phrasing is “*experts in TK of relevant IPLC*”. The ambiguity of “*relevant TK*” raised by CLAM should be revisited in the request for participation of experts in the Scientific and Technical Body. In this regard, the suggestion that COP elaborate on finer details here may be a useful repositioning. The ambiguity raised by CLAM, does not just cover the reference in the section on Scientific and Technical Body, but raises the question of a shared understanding across the BBNJ wherever it is used. “*Conservation and sustainable use programmes by holders of TK of IPLC*” is a positive inclusion in the voluntary trust fund alternative but could be rephrased to “*holders of TK of relevant IPLC*” for consistency. Caution is needed around the potential for the suggestion to drop IPLC and to simply read “*for TK holders*”. This would reduce the IPLC position in favor of States as TK holders. [52(5e)] [34(2)], 16(1), 14(f), 49(2), 51(2), 51(4b), Annex 2(e.iii)]



Non-disclosure of information in regard to IPR re-emphasizes the protection of Western Scientific Knowledge whereas there is no complementary binding mechanism for closed, sacred and collective TK. Although there is treatment in the instrument of TK via “*cultural and other relevant impacts*”, it is worthy of note that overuse of undefined *culture* and *cultural* could trigger adverse responses to TK of IPLC positions. [12, 10bis, 34(5), 45(2 Alt#1), 35(2)]

Annex 1 refers to cultural factors within indicative criteria which, if deleted may negate TK and limit participation of IPLC. Alternatively, a broad scope list in the article itself could include cultural values or factors although these could also be seen as vague and run the risk of not making the instrument future proof. Similarly, Annex II captures two references to TK. In the first, it is good to see consistency in phrasing of “*relevant TK of IPLC*” and inclusion of the recommended [*in line with the principle of prior informed consent*]. In the second, under Policy and Governance, it captures the *relevance and application of TK* and *exchange of experts* including on TK. If the position is to maintain these reference points, this TK language will need to be mitigation for inclusion within CBTT articles. [Annex 1(p), Annex 2(biii; diii)]

3. Guiding questions to aid discussions

- a) What mechanisms can be used to identify TK experts of relevant IPLC (taking into consideration issues around language and capacity to engage at the level of COP/CHM/Scientific and Technical Body and subsidiary committees, etc) in the region? Should the modality of identification of TK experts be set in the instrument or by the COP?
- b) (i) Are there any thoughts/positions/responses regarding the CLAM concern of ambiguity around “relevant TK”? (ii) Is there a common position or understanding of this terminology?
- c) What are the thoughts around the phrasing and meaning of: (i) “relevant experts in TK of IPLC”, (ii) “experts in TK of relevant IPLC”, and, (iii) “Experts in relevant TK of IPLC”.
- d) (i) What is the distinction between “Cultural values” and “Cultural practices” or “uses”? (ii) Are there any strong views or positions regarding this and the alternative use of “cultural impacts”
- e) To reduce the potential misuse of ‘culture’ and ‘cultural’ and to maintain the consistency in language surrounding TK of IPLC, are there any strong views regarding where these ‘*cultural*’ references may be dropped? Or, alternatively, where a decision may be taken for consistent usage capturing principles of conservation and sustainable use and does not open the door for exploitative “*cultural values or practices*”?
- f) (i) Are there *monitoring and protective mechanisms* at the national level and regional level for the protection TK of IPLC in ABNJ? (ii) If not, what work needs to be done in this area to complement the BBNJ Instrument?
 - 7 (Alt#1) *cultural* and human health *impacts*
 - 14(f) and other socioeconomic objectives including the protection of *cultural values*
 - 27(1) or areas [ecologically or *culturally*] *connected* to such areas
 - 31(2d) key environment [socio, economic, *cultural* and other relevant] [*impacts*] [*issues*]
 - 35(2d) including [socio, economic, *cultural* and other relevant *impacts*]
 - 35(2g) [and other adverse social, economic, *cultural* and relevant *impacts*]
 - Annex 1(p) *cultural factors*



SESSION 4 MGRs and ABS

Facilitators: Sala Tagicakibau (Fiji) & (Dr. Katy Soapi)

1. Understanding from previous PIF BBNJ meeting

MGR and ABS was discussed at the previous BBNJ PIF negotiators meeting as an issue requiring further discussions and understanding of members' respective interests and positions. Members discussed the issue of fish as a commodity and it was agreed that fish used for their genetic purposes should be included in the instrument although this should be done with caution to avoid loopholes in existing fisheries instruments, in particular those of our region.

Furthermore, discussions identified wide gaps in capacity at all levels with respect to MGRs and MSR. The provision of tangible and sustainable benefits, particularly those that can respond to the needs of the recipient countries, could contribute to a level playing field. In terms of benefits, a combination of monetary and non-monetary as well as mandatory and voluntary benefit sharing was preferred. Benefit sharing could also support countries' conservation and sustainable use efforts in areas within national jurisdiction.

The establishment of a regional hub/office or a center of excellence to cover a range of issues from benefit sharing to capacity and technology needs assessment was also discussed.

2. How the issue is reflected in the 0-draft

The revised 0-draft reflects well the divergent views associated with MGR and ABS. Key definitions remain unclarified, such as "marine genetic material" or "access to" MGRs. On the issue of access, countries remain at odds on the definition of access in relation to MGRs, in particular on whether referring to access as the collection of MGRs was sufficient, and on whether to include any or all of the bracketed references to MGRs accessed in situ, ex situ, and in silico, and as DSI and data. Some stressed the need for a broad definition, going beyond the simple collection of MGRs and that it should be as robust as possible and include resources accessed in situ, ex situ, in silico, and as genetic sequence information and data in any form whatsoever. Others proposed that access in relation to MGRs means the collection of MGRs in ABNJ. This divergence underpins the MGR section.

Delegations are particularly divided on the question of whether fish should be included as a marine genetic resource, due to concerns of impacts on current fisheries management and the problematic definition of "fish". If fish is to be excluded from the agreement, there needs to be careful deliberation. The objective of the agreement is about the conservation and sustainable use of marine biological diversity in BBNJ. Its inclusion adds value to the overall objective with regards to the use of MGRs and does not undermine marine biological diversity.

Unsurprisingly, article 11 on benefit sharing also reflects the divergence of views. Capacity building (especially scientific and technological) is a form of benefit-sharing and can contribute to conservation and sustainable use of BBNJ. Existing rights and responsibilities under UNCLOS relating to marine scientific research and technology development and transfer provide a basis. The BBNJ instrument can enable benefit-sharing by giving greater effect to existing obligations under UNCLOS, in particular those of article 143. Recognizing the special circumstances of SIDS could support stronger links between existing obligations and provisions for benefit sharing and CBTT under this instrument. If the benefit sharing mechanism/scheme is to be effective, there will need to be adequate traceability. Some delegations have, thus,



supported the view that the BBNJ instrument must provide for such a system either through notification (pre and or post cruise) or a licence/permit for in-situ access and/or collection. For research and development purposes, access to those including to ex situ collections, is also viewed as important by some delegations who are strongly supporting open access provisions. This open access also encourages reuse. There are already experience of open access and growing experience in MGR in ABNJ from which good practise relevant to BBNJ Treaty can be captured e.g Tara Ocean Foundation.

Article 12 on IPR raises many divergent opinions. On the one hand, some delegations support that the instrument must respect IPR, while other support the position that IPR must be used as support for traceability and should not be used to hinder benefit sharing, in particular as regards TT.

3. Guiding questions to aid discussions

- Is there room to include both “collection of” and “access to” MGR of ABNJ or are these two concepts too divergent?
- Which types of access to MGRs should be part of the material scope of the agreement (*in situ*,; *ex situ*,; and/or *in silico*, DSID)? Should there be much details on access or can these issues be dealt with in the COP?
- The nature of benefit sharing (voluntary/mandatory or monetary/non-monetary); its modalities, and triggers: How much of the benefit sharing provisions be strongly linked with CBTT and CHMechanism sections, if at all?
- How to determine who gets benefits, and how?
- Article 10 misses the concept of ‘no harm to the environment’: should there be a link between access to/collection of MGR of ABNJ and EIAs?
- Can the respect of IPR be necessarily antagonistic with the provision that IPR should not be used to hinder TT? How can IPR be used to support the implementation of the instrument, including provision of benefit sharing and CBTT? How much can be left outside of the instrument and what is the minimum that must be reflected in the instrument and not left to WIPO.



SESSION 5

Institutional Arrangements

Facilitator: H.E. Ms Margo Deiye

1. Understanding from previous PIF BBNJ meeting

A key component for the negotiations will be to elaborate the roles and responsibilities of the States Parties and institutional structures for cooperation and collaboration. Some of the key questions may be:

- what types of bodies will be needed?
- should there be new bodies, reliance on pre-existing ones or a combination?
- what will be the roles and responsibilities of each organization?

At the previous negotiators meeting in June 2019, participants concurred that there is no single regional organization covering the full scope of the proposed new agreement, which is understandable given the complexity and broad scale of the instrument. Some organizations capture some elements.

There was agreement that the new ILBI needed to capture the specificities of the region and recognize the work and expertise from existing regional organizations.

There was also agreement for the need for a strong international body that brings together stakeholders, including other organizations, to the table to agree on common global standards and criteria for the respective elements. However, the discussions highlighted the reluctance in having a global body take management measures in the high seas pockets that would not be in line with the region or adjacent coastal states' interests and objectives.

On discussions on the different options for the interface between the global and the regional levels, it was expressed that either countries could work directly through the global body or through a coordinating body across regional organizations. Participants were also mindful of the particularities of the Blue Pacific region, in particular that other regions may not have the same regional framework. They recognized the importance of drafting provisions that could be flexible enough to be implemented in all regions and still capture the characteristics of our region.

Discussions on the role of traditional knowledge in the instrument also include considerations on the possibility of involving TK representatives included in the institutional arrangements such as a COP, the Scientific and Technical Body.

2. How the issue is reflected in the 0-draft

COP: The revised 0-draft provides for a COP with broad functions, including criteria or threshold setting, adoption of rules or guidelines, or decision-making. However, as these provisions are bracketed and contested, it is not clear what the COP's functions will end up being.

Among missing functions in the 0-draft are measures to improve the implementation of the instrument, which is also linked with adaptive change or adaptive management, as well as provisions to address lack of compliance. Furthermore, proposal on transparency has not been included either.



It has been recognized that one of the added value of the BBNJ ILBI is to provide coherence and increased cooperation with other instruments, frameworks and bodies. The establishment of a cooperation process under the COP was suggested. It is also bracketed because some delegations do not want the instrument to be in a position to drive other instruments (article 48.4.c)².

The formula between regional/sub-regional and global levels in the institutional arrangement of the BBNJ ILBI will be critical. The current 0-draft does not ensure global accountability and cross regional coherence and avoids addressing inter and intra-regional inequities or forum shopping.

As regard the decision-making formula, Art 48 (3 & 3bis) needs clarity on how the COP is going to make decisions. Decision making formula in the COP is critical. More details could be determined by COP since it is to set its rules of procedure, but this also runs some implications to consider.

STB: It is recognized that a guiding approach is to use best available scientific information and relevant TK of ILPC. This makes for the establishment of a Scientific and Technical Body (article 49), and one of its objectives should be providing scientific and technical advice. However, the scope of this advice is not yet set as there are varied views on what and where the STB would intervene.

There are also important functions missing, including:

- Respond to scientific, technical, etc. questions that the COP and other subsidiary bodies may submit;
- Regular assessment of BBNJ, which can be done with regular process;
- ID new and emerging issues relating to the conservation and sustainable use of BBNJ;
- Advice on scientific progress and international cooperation in R&D and CBTT

Furthermore, it is unclear how the STB would be working with or interact with other scientific and technical bodies from sectoral or regional/subregional IFBs.

Secretariat: As regard the Secretariat, Art 50 provides several options. The decision could be done later by the COP and in the interim designate DOALOS. It is important to bear in mind the current limited capacity of DOALOS to act as Secretariat.

Clearinghouse Mechanism (CHM): Art 51 is very detailed and may go beyond what a CHM's role is, which should not be a compliance mechanism. Rather, a CHM ought to provide information sharing and dissemination services. It also needs to be future-proofed.

Furthermore, it is important to note existing mechanisms in our region as well as plans as part of the UN Decade on Ocean Science, including the Pacific Portal.

3. Guiding questions to aid discussions

- a) How can the institutional arrangement formula be designated to ensure that the Blue Pacific characteristics and interests are adequately addressed?
- b) How will the COP decide on its decision-making formula? What form might be most desirable for the Pacific?

² In the Pacific region, the OPOC coordinating sectoral CROP for this process is another example of the need for a coordination mechanism to have the different secretariats speak to each other and collaborate. Leaving it to SPs alone to negotiate measures within each body and framework may prove very difficult to implement and perpetuate the silo approach currently implemented



- c) How can regional activities and mechanisms contribute to the achievement of global objectives? How can a new instrument enhance the effectiveness, inclusiveness and capacity of regional and sectoral institutions?
- d) How can effective cooperation and collaboration between the BBNJ body and other IFB be framed so that there is coherence in the conservation and sustainable use of BBNJ?



SESSION 6

Conservation and management of high seas, including high seas pockets; and discussion on fish

Facilitators: Mr. Fred Sarufa (PNG) & (FFA, Mr. Pio Manoa)

Guiding questions:

- a) What are the implications of "fish" as a genetic resource being part of MGRs?
- b) What are the implications of the IA on the functions of RFMO/As?
- c) What are the implications of the IA on ABMTs and Fisheries Assessments applied by RFMOs?
- d) What are the implications of the monitoring and compliance regime under the IA on the fisheries sector?
- e) What are the obligations envisaged under the IA and is there a disproportionate burden on SIDS? And is there a risk of duplication of obligations?



SESSION 7 Strategic Environmental Assessments (SEA)

Facilitators: Ms. Janice Mose (Solomon Islands) & (FFA (tbc)/SPREP)

1. Understanding from previous PIF BBNJ meeting

The first BBNJ PIF negotiators meeting did not discuss SEA. The suggestion was made during a PIF meeting in the margin of IGC3 to include SEA as an area of convergence for the group and discuss how to promote its inclusion in the future BBNJ instrument. As a result, this second BBNJ PIF negotiators meeting will include a session on SEA.

A SEA is conducted at a higher level than an Environmental Impact Assessment (EIA) and is not triggered by an activity proposal. While SEA can be used to support EIA or determine requirements for EIAs, SEA are usually conducted on a much broader scale with less requirement for detailed baseline studies. Because they are conducted on a broader scale they are much better at accounting for cumulative impacts than EIAs which are project or activity specific.

SEA is a process of prior examination or appraisal of policies, plans, and programs and/or multiple development projects in a given geographic area, which considers how potential uses might impact upon ecological, social, economic and cultural values and other (current and) potential uses so as to produce general environmental management policies or design guidelines for the development of classes or types of activities

Reasons for doing SEA

- f) Transparent public consultation process which brings all stakeholders to the table
- g) Identifies potential conflicts of use
- h) Good tool for identifying natural cultural and resource vales for an area
- i) Identifies all the competent bodies and their respective management arrangements in an area
- j) Useful screening tool to determine which activities need EIAs (note it is not a replacement for EIA as suggested by Australia in Art 28 2bis)
- k) SEA can also be used to allocate resources and as a preliminary tool for identifying areas for protection or ABMT under PART III.
- l) As a strategic planning tool, a SEA could be conducted to set EIA threshold criteria for specific regions or sub-regions, because some habitats and regional seas are more sensitive to specific impact types than others.

It needs to be clear that SEA is an upstream process and that it is distinct from the EIA process, it is not a substitute. Rather SEA can be used to support the need for EIA and set thresholds for what triggers EIA in a geographic area and authorizing or not authorizing activities. It also aids cooperation to allow decisions on the optimum and sustainable allocation of resources in an area.



2. How the issue is reflected in the 0-draft

SEA is a highly contentious issue in the BBNJ ILBI with strong opposition to its inclusion of consideration of Strategic Environmental Assessments by Ecuador, China, Norway and Japan. The Republic of Korea and United States recognized the usefulness of SEA but don't want it in BBNJ ILBI. Supporters of SEA include PIF members, EU, CARICOM, Monaco.

Article 1 .13 suggests that *“Strategic environmental assessment” means the evaluation of the likely environmental, including [socioeconomic] effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.*

The assessment of cumulative effects/impacts is a key benefit of undertaking SEA.

Article 21 bis c), “Provide for Strategic Environmental Assessments”, is [bracketed]. Perhaps delegates could consider using stronger wording than “provide” so that the BBNJ instrument clearly establishes an SEA protocol/process with clear standards. Article 21bis also calls for processes, thresholds and guidelines for conducting and reporting assessments and consideration of cumulative impacts – SEA are better at considering cumulative impacts than EIA Therefore, emphasis and preference for the use of SEA to assess cumulative impacts/effects could be supported.

Article 28 sets guidance for when an SEA could be conducted.

It is important that the process of EIA and SEA not be confused. Removing reference to SEA as a type of environmental assessment is a good step in reducing the accidental mixing of the two processes. As SEA can be applied to policies, plans and or programmes to evaluate the interlinkages with economic and social considerations, SEA may use a variety of tools rather than a single or fixed prescriptive approach the process. Therefore, the SEA process can be adapted to the context which it is applied.

There is a need for substantial redrafting of the article 28. The suggestion made to include cumulative impacts in the assessment is also a good step. SEA are superior to EIA in this respect because they are not project focused and therefore can more easily incorporate consideration of cumulative impacts, including of other activities.

While an SEA may lessen the work and cost to complete a subsequent EIA (as some of the information and key risks may have already been identified during the SEA process which can then be used to focus the EIA), it does not provide the level of detail required to assess the impacts of a specific activity. Therefore, a SEA cannot be used to replace an EIA.

As was suggested (Singapore), the use of sub regional or regional SEA may be a tool for PIF countries to identify key risks and set thresholds for when EIA should be triggered for activities. This could refine the process to exempt low impact activities from requiring EIA. It may also identify areas where particular activities should be excluded for cultural, economic or environmental reasons. This concept is one that could be discussed by the PIFs.



The placement of SEA in Part IV of the 0-draft could be contributing to this misunderstanding of the different roles of SEA vs EIA. The two processes while complimentary are not interchangeable with both having limitations.

The 0-draft mingling of the application of EIA vs SEA has led to referring to the use of EIA for assessing cumulative impacts in Article 25. While EIA should, where possible, consider cumulative impacts it is not always feasible to do so. Therefore, the use of SEA should be considered a better tool here.

Regarding the 0-draft Article 25, it was suggested by some delegations that cumulative impacts shouldn't be a stand-alone article but should be mainstreamed instead. However, one should make sure it is consistently included into the EIAs and SEAs, so the recommendation is to include it until certain that it appears in all relevant provisions. A stand-alone article is useful to allow determination of how to consider cumulative impacts.

3. Guiding questions to aid discussions

- Should SEA be used to set thresholds for which activities are authorized or not in a sub-region or region as well as triggers for which activities require EIA or not?
- What definition of an SEA are we willing to accept? Is the suggestion to include socioeconomic acceptable?
- Discuss suggestion for possible redrafting of article 28 as well as its placement
- What should be the role of SEA as regards cumulative impacts?
- SEA is also a useful tool for deciding on appropriate spatial conservation measures. Does the current draft allow for SEA to be used in other Parts of the instrument (e.g. Part III)

-ENDS-