**QUESTIONAIRE FOR DISCUSSION ON PRINCIPLES AND EACH OF THE FOUR ELEMENTS OF THE 2011 PACKAGE**

**ANNEX 1**

* **with comments from the Secretariat of the Pacific Regional Environment Programme (SPREP), for use by our member states and their UN Missions.**

**SCOPE**

A new implementing agreement under UNCLOS should address the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction, including marine genetic resources, access including marine scientific research and benefit-sharing with necessary consideration of the issue of intellectual property rights, capacity building and the transfer of marine technology. There is an array of existing agreements and conventions dealing with different species of marine resources, so a review of existing treaties and agreements will have to be undertaken.

**PARAMETERS**

A multilateral instrument should aim at implementing the relevant principles of UNCLOS and of General Assembly Resolution 2749 (XXV). Such an agreement will have to be negotiated following the parameters of UNCLOS i.e. as a package.

**GENERAL PRINCIPLES**

In terms of the relationship between the proposed implementing agreement and other instruments, many view that a new instrument should complement, rather than undermine, duplicate or change existing instruments, and should enhance cooperation and coordination in that regard and facilitate coherence.

In terms of the legal principles, we have provided some below. These currently are the most discussed principles but we may wish to add any further principles if necessary. Please note that we have attempted to define some of the principles to help kick-start the discussions:

**[Still incomplete] Comments in blue after each question are from the Secretariat of the Pacific Regional Environment Programme (SPREP), for use by our member states and their UN Missions.**

1. Precautionary approach?

Yes, a particularly important principle for maintaining biodiversity in high seas areas, where there is limited bio-physical information and very limited capacity to enforce regulations for sustainable use.

1. Science based approach or decision-making based on best available science?

If there isn't conclusive science, decisions should be made on a combination of the best available science and the precautionary approach. Perhaps someone has a better insight into this?

1. Ecosystem approach?

Yes, and it should be globally accepted by now that where the planet’s natural resources and ecological systems are concerned, an ecosystem approach should be adopted.

1. Integrated approach?

Yes, for #3 above (Also assuming this to mean that all aspects of the available science and risk assessment are considered).

1. Adaptive management?

Yes - if the activity is not ruled out by the Precautionary Approach. Adaptive management should not be the default position of allowing an inherently risky activity to take place on the grounds that it will be monitored and action will be taken adaptively if things go wrong.

1. Transparency and accountability, including the public availability of information?

Yes, using the CBD-ABS Clearing House Mechanism and involving GMR storage facilities, processing labs, trackable samples and genes, etc, etc.

Any developments or activities that impact on or relate to issues of national interest should involve public engagement and consultation.

1. International Cooperation?

Needs to be teased out further, but in principle, yes.

1. Common heritage of mankind?

Yes (although I can't imagine that this would really be up for debate)

1. Freedom of the high seas?

We are not convinced on this. UNCLOS permits a range of activities on the high seas that are generally significantly more permissive than allowed in many EEZs. This needs a broad debate.

1. Adjacent seas?

There is a strong argument that SIDS with abutting maritime boundaries and/or abutting high seas areas should have special consideration under UNCLOS. This is especially relevant for PI SIDS and should be discussed in detail. Examples:

* Consider provisions for environmental compensation.
* Need clear criteria and thresholds for determining who will receive compensation in cases where pollution/impacts move from ABNJ to EEZs.

1. Principle of common but differentiated responsibilities?

We don't know anything about this

1. Special requirements of developing countries, including landlocked States?

See 10 above - maybe this answer is more applicable here

1. Duty not to transfer damage or hazards or transform one type of pollution into another?

Yes. Pacific Island countries have particular needs and views on shipment of hazardous materials (eg., nuclear materials) through the region. …..

1. Polluter-pays principle?

* Yes - and it should apply to discarded fishing gear too
* Consider provisions for environmental bonds. In general, environmental bond calculations should be based on the cost of stabilising, repairing and rehabilitating a site, taking into account the size of a development/activity, the level of risk it poses, and the extent of environmental harm it could potentially cause.

1. Cumulative impacts of ocean uses?

Yes

1. Flag State and port state jurisdiction as a basis for enforcement on the high seas?

Yes, but not the sole basis for enforcement. Enforcement will also require good collaboration of RFMOs and adjacent states, but many gaps are still to be addressed in existing RFMO management effectiveness.

For example: For the WCPFC the decision making process faces critical obstacles because decisions require either a unanimous decision or a 2/3rd in agreement needed from the two major groups (FFA members and the Distant Water Fishing Nations - DWFNs). The dominance of distant water fishing nations, and their un-willingness to address major issues, blocks the ability of the RFMO to make decisions for responsible use of ocean resources.

Tuna RFMOs (t-RFMOs) such as WCPFC also only focus on target pelagic fish species, and other important pelagic and migratory species, and by-catch species may not be adequately covered under RFMO agreements.

**MARINE GENETIC RESOURCES AND BENEFIT SHARING:**

Also should refer to Geoff Burton, United Nations University, Institute for the Advanced Study of Sustainability, on MGRs and the merits of existing functional ABS Clearing House mechanisms being used by Australian institutions (has several potential benefits for PICTs).

1. What is ‘marine biological diversity’, including its subject matter and geographic scope?
2. Should the definition in the Convention on Biological Diversity be relied on?

Yes. However, there may be a need to further clarify and define some commonly used concepts and terminologies to avoid confusion. Under the CBD “biological diversity” is defined as: “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems”.

1. Would it include all living organisms in the whole of the high seas and on the Area?

It should be noted there are also other existing international instruments such as the UN Fish Stocks Agreement which deals with highly migratory and straddling fish stocks, the International Seabed Authority which deals with seabed and its resources, and perhaps other instruments adopted by the FAO which cover marine ecosystems and living organisms.

SPREP’s view is that there are deficiencies in these other instruments that could usefully be addressed through the BBNJ process. A useful first step might be to undertake a gap analysis.

1. Only those living organisms on the seabed of the Area?

Absolutely No (this is further complicated if you include benthic, demersal or pelagic organisms that move across multiple jurisdictions during their life history).

The interdependence among all organisms (benthic, demersal or pelagic) and ecological processes makes all components of biodiversity important to the overall ecological integrity and biodiversity of any ocean area or system.

1. Only the living organisms in the water column near specific seabed formations?

No (“ “ “)

1. Should both of the latter two proposed definitions exclude other living organisms?

No (“ “ “)

1. What assets and benefits should be shared?

Pacific SIDS do not have the capacity of larger states and economies to directly access certain assets and benefits from our neighbouring high seas. They will consider it important to secure rights for their own use of these assets and access these benefits and also their rights in any decision making for those assets and benefits and their conservation or management, particularly where activities in the high seas may immediately influence the health of immediately adjacent EEZ resources. The provisions of the CBD on ABS and the decisions made by the international community in this regard should guide discussions on ABS for BBNJ. The same concerns apply in regard to fisheries, deep sea minerals, etc.

a. Monetary? Of royalties, revenues, etc.?

Yes. To be further discussed by the SPREP Blue Team

b. Non-monetary? What kinds?

Yes. IP, Data and capacity-building tech transfer etc.

c. How should the monetary and non-monetary benefits be shared? In the same or different ways?

To be discussed. Look at the ISA formula.

1. How should intellectual property rights on MGRs be regulated?

Same principles as national regulation. IPRs might need to vest in an international organisation. (but Common Heritage of Mankind complicates this). EEZ jurisdictions “immediately adjacent to High Seas” may have special rights???

1. How are MGRs currently regulated nationally?

PICs that are/will be parties to the Nagoya Protocol, will have regimes that comply with the NP. At least 2 PICs have laws; most of the others are likely to have minimal safeguards or would allow bioprospecting on a case by case basis. Territories will differ according to whatever arrangement they have with their metropolitan capital.

1. What are ‘marine genetic resources’? Are they included or excluded from marine biological diversity?

Included – especially needed if a species variant is the only source of a particular gene.

Under the CBD “genetic resources” is defined as: “genetic material of actual or potential value”

Further, genetic material means “any material of plant, animal, microbial or other origin containing functional units of heredity”.

Similarly, CBD also defines "Biological diversity" as the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

1. What, if anything beyond the mineral resources of the Area, should/could be included as common heritage of mankind?

a. Living organisms on and in the seabed of the Area, or just their MGRs?

Both the organisms and their MGRs. (Since the MGRs can potentially be cultured ex-situ (separately to the organism).

b. Living organisms in the water column that remain in contact with the seabed (such as support endemic and unique communities such as hydrothermal vents and cold seeps?

Yes - comments as above

Higher in the water column?

Yes If they are higher in the water column some may drift into national jurisdiction, so would depend on the degree of mobility of such organisms.

1. Is there any indigenous knowledge related to Marine Genetic resources in areas beyond national jurisdictions in the Pacific?

It would be difficult or impossible we would think to demonstrate TK relating to unique organisms in ABNJ, but Katie, a Solomon Islander alongside Bill Aalbersberg might have some thoughts on that as both are active in marine bioprospecting and have been for some time.

**AREA BASED MANAGEMENT TOOLS (ABMT), INCLUDING MARINE PROTECTED AREAS (MPA):**

1. How do we define “area-based management tools”/“marine protected areas”

“Area-based” involves zoning/ zones of use-restrictions (may include temporal component). Marine Protected Areas is open to a range of definitions (cf, six IUCN categories). In the Pacific, SPREPs interpretation of MPAs is where human activities are sufficiently well regulated to ensure that ecosystems, species, communities and populations achieve their maximum potential.

NOTE: However, given the difficulties of monitoring control and surveillance (MCS) on the high seas, MPAs on the high seas should be no take (ie more stringent than may apply in some EEZs)

1. What do we consider “areas of particular environmental interest”

[examples may include: CBD’s EBSAs, sources of breeding aggregations or larval recruitment, etc], “significant/key biodiversity areas”, or “particularly sensitive sea areas”? How should they be governed?

The definitions vary according to the legislation or governing principles under which they were established; eg., CBD has developed EBSAs; IMO has developed PSSAs. Governance would potentially rest with the establishing institution, and bind the members of that institution.

1. What should be the criteria for establishing high seas marine protected areas and how would they relate to national realities?

To be discussed but could include:

* Areas of high biological diversity
* Areas of particular importance for reproduction of threatened species
* Important foraging areas for species of conservation interest
* Geologically or geographically significant areas

1. What role is there for marine spatial planning?

The same role as for coastal and EEZ scale waters - addressing the problems of competing interests for maritime space and resources through a zoning and/or resource allocation exercise involving all stakeholders, and through a MSP process that closely engages the key stakeholders to achieve their support to the process, its outcomes, and to future management. May need to be more stringent, given the increased challenges of MCS in high seas. Pacific SIDS would have interests to ensure that MSP in neighboring high seas is harmonized with their adjacent needs and does not undermine the efforts in resource management within their EEZs.

1. What should be some of the objectives of a MPA in ABNJ?

Conserving and protecting:

* Areas of high biological diversity
* Areas of particular importance for reproduction of threatened species
* Important foraging areas for species of conservation interest

….. particularly to achieve regional CAR (comprehensiveness, adequacy and representativeness of the above).

1. What should be the process establishing it?

Science and evidence-based, multi-sectoral and multi-level

1. Who is responsible for the preparation of management plans?

The proponents, based on a consultative process open to all countries and stakeholders with a legitimate interest

1. The proponents of an MPA should submit a proposed management plan to the decision making body.

Yes

1. What are some of the MPA management measures that Fiji should consider?

See 5 above

1. Who should be the MPA management and enforcement authority? RFMO’s? Should a centralized monitoring system be an option?

Management and enforcement should definitely not be solely by RFMOs, However, RFMOs should have a role in monitoring, control and surveillance (e.g. through Vessel Monitoring Schemes). A centralized monitoring system similar to the International Seabed Authority could be an option. Perhaps regional/ adjacent states, through the appropriate IGOs, could be appropriate management and enforcement authorities.

1. Obligation to comply with the enforced management measures?

Yes

1. Reporting, Monitoring and Review?

The duly-appointed Management Authority

1. Review Mechanism and Authority?

The duly-appointed Management Authority

1. Should there be regionally established MPAs? Who should decide on these?

Yes - the regional/adjacent states, through the appropriate IGO(s)

1. RFMOs? Or should it be centralized and all be decided upon by the ‘decision making body’.

Definitely not RFMOs - best would be the appropriate IGO

**ENVIRONMENT IMPACT ASSESMENT**

1. What should be the threshold for requiring EIAs? Article 206 of the United Nations Convention on Law of the Sea? Something else?

Any activity or development that has the potential to impact on BBNJ or related resources and ocean processes (e.g. physical, chemical, biological) should be subject to EIA.

For EIA consideration[[1]](#footnote-1):

* Deep sea prospecting, exploration and mining
* Fisheries activities
* Shipping lanes (design/operation)
* Cables, pipelines and other seabed installations
* Floating installations
* Marine bioprospecting
* Dumping (for activities listed in Annex I to the 1996 Protocol of the London Convention)
* Ocean fertilization (as per London Convention and 1996 Protocol)
* Geo-engineering
* Deep sea tourism
* Military activities (particularly important for protecting marine mammals, however, very difficult to conduct EIA in practice due to the semi-public or confidential nature of activities)

Note, the scope/scale/intensity of EIA will vary depending on the level of environmental risk associated with an activity.

Regarding Article 206:[[2]](#footnote-2)

It may be taken as significant that the term “assess” is used instead of “environmental impact assessment”. By referring to the more ambiguous term “assess”, Article 206 does not fix the requirements for an EIA, but instead allows states to make such a determination in accordance with their capabilities and their domestic legislation. This was likely important in 1982 (when UNCLOS was adopted), especially for developing states and states in transition whose capacity to carry out EIAs was considerably lower than developed states, however, it is arguable that “environmental impact assessment” is best specified now, to promote a more rigorous and consistent level of assessment.

1. What is the threshold nationally for an EIA?

National thresholds differ across PICs (prescribed under national EIA legislation/regulations).

Need to define specific thresholds for different activities in ABNJ.

Could also have lists of areas where EIAs will always be needed (e.g. Ecologically or Biologically Significant Marine Areas, Vulnerable Marine Ecosystems) and lists of activities which would always be subject to EIA.[[3]](#footnote-3)

1. How should the new agreement on BBNJ address transboundary environmental impacts?

Need a precautionary approach, particularly where EEZs immediately abut ABNJ, and high seas pockets in Pacific Islands region.

Also important to note that understanding of baseline environments within EEZs is often limited, which could make it difficult to assess transboundary impacts.

1. What are the national requirements and processes for EIAs, which elements might we like to see be incorporated into an international regime?

* Screening of activities (based on appropriate thresholds)
* Scoping (i.e. development of project/activity-specific terms of reference for all EIA reports)
* Impact assessment and EIA report preparation (by activity proponents)
* Review of EIA reports
* Decision-making
* Compliance monitoring and enforcement (based on appropriate thresholds for different operational aspects of activities)
* Public notification and consultation

Key question/issue: establishment of a global competent authority to oversee above, e.g. creation of a global compliance committee, with an advisory scientific and technical body.[[4]](#footnote-4)

1. How can we possibly address the issue of ‘conflict of interest’ in EIAs?
2. Who should conduct the assessments?
3. Who passes or determines the integrity of the assessment?
4. Should there be an insurance type fund in place?
5. Timeframe for any assessment?

Establishment of an international association that reviews and accredits EIA consultants for ABNJ; sets standards for EIA methods and reports; supports skill and knowledge development; provides scientific and technical guidance; and develops a binding code of ethics for accredited consultants.

Insurance-type fund = environmental bond system?

1. Environment Management Plans (EMP)?
2. Who will approve the EMPs?

Perhaps best done at the sectoral level, where the most relevant knowledge and expertise is likely to sit e.g. ISA for DSM activities, FAO for fisheries. However, it will be important to ensure a consistent environmental management standard/approach is applied across sectors.

1. Adaptive Management?

Yes, inherent to good environmental management.

1. Should there be a consultative obligation for states or companies carrying out activities in close proximity to Fiji’s EEZ?

**Yes.**

Also important to consider the application of **strategic environmental assessment (SEA)** to:

* allow for the consideration of alternative conservation/development/resource use scenarios for a defined ocean area;
* define broad-scale environmental targets and objectives for a defined ocean area, and to identify areas requiring specific protection;
* identify likely environmental, social and economic impacts (positive and negative) across a range of sectors and also for countries (especially in transboundary situations);
* promote integrated management of multiple marine uses;
* assist with early identification and assessment of cumulative and transboundary impacts.

Note, SEA is in line with **ecosystem approaches** (rather than site-specific approaches) and **integrated approaches to ocean management**.

It may be difficult to agree on the agencies that will be responsible for carrying out SEAs in ABNJ and for taking follow-up decisions, especially where different activities are being regulated by different international institutions. Coordination and cooperation across institutions will be very important.[[5]](#footnote-5)

**CAPACITY BUILDING AND TECHNOLOGY TRANSFER**

**This component of the UN Implementing Agreements on ABNJ is targeted to SIDS in particular.**

1. For what subjection would we prioritize capacity building and transfer of marine technology?
   1. What financial means?
   2. Specialized knowledge?
   3. How can Part XIV of UNCLOS on the “development and transfer of marine technology” be better operationalized?
2. Should capacity building be reactive to the needs of the Small Island Developing States and Least Developed Countries first?
3. Should a trust fund be considered for the new instrument? If so, what should be considered in the establishment and operation of a trust fund?
4. What have been the most successful capacity building and technology transfer experiences for us nationally? What were the factors which made them successful for us?

Capacity building could be delivered though regional organisations/IGOs, based on internationally agreed frameworks/standards, to promote regionally-relevant and consistent approaches.

**GENERAL QUESTIONS**

1. From a national/political perspective, what existing institutions would serve well as Secretariat for BBNJ?

The UNEP Regional Seas Programme (with links to DOALOS)?

1. How can we not undermine national, sub regional and regional fisheries regimes while address the need for conservation and sustainable use of marine biodiversity in areas beyond national jurisdictions?

That presupposes that the national, sub regional and regional fisheries regimes are effective in sustainably conserving fish stocks, which is very much a moot point. However, that is not to say that the experiences of RFMOs and the skill sets of their staff and members cannot play an important role.

1. What fisheries aspects in the high seas are not currently covered and could be included?

Prohibit trans-shipments on the high seas, improve surveillance and allow inspections on the high seas by a wider range of entities and develop the ability to set quotas and more effectively control fishing effort on the high seas

1. What lessons – positive or negative – can be learned from the government and management of fisheries in the Western and Central; Pacific that Pacific Islands states would want to bring to areas/biodiversity beyond national jurisdiction?

Many gaps are still to be addressed in existing RFMO management effectiveness.

For example: For the WCPFC the decision making process faces critical obstacles because decisions require either a unanimous decision or a 2/3rd in agreement needed from the two major groups (FFA members and the Developed states). The dominance of distant water fishing nations, and their un-willingness to address major issues, blocks the ability of the RFMO to make decisions for responsible management and sustainable use of ocean resources.

RFMOs also only focus on target pelagic species, and other important pelagic and migratory species plus bycatch species are not covered or not considered under RFMO agreements.

Better monitoring, surveillance and control of activities in ABNJ (trans-shipments of fish and failure to control fishing effort on the high seas have crippled the attempts of WCPFC to establish a sustainable regime for some species of tuna and have had serious impacts on domestic fisheries. While eco-labelling, Marine Stewardship Council and other certification schemes have gained acceptance in Western markets, such controls have yet to have a significant impact in Asian markets.

1. How to create a regime which will enable innovation and research while enabling benefits sharing in the area of marine genetic resources?
2. How can this implementing agreement on BBNJ address the issues of pollution and ocean acidification?

It's hard to see how it can - MARPOL is designed to address pollution issues, but enforcement is a major problem. Ocean acidification is directly related to carbon dioxide emissions and should be addressed through UNFCCC

1. Would the ratification of the ‘Port State Measures’ add value to the sustainable management of our oceans resources?

Yes, if adequately enforced by all Member States

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4. How do create a regime which will enable innovation and research while enabling benefits sharing in the area of marine genetic resources?
5. How can this implementing agreement on BBNJ address the issues of pollution and ocean acidification?

Aren't these all repetition?

1. Ma D., Fang Q. and Guan S. (2016) Current legal regime for environmental impact assessment in areas beyond national jurisdiction and its future approaches. Environmental Impact Assessment Review, 15: 23-20.

   Elferink A.G.O. (2012) Environmental Impact Assessment in Areas Beyond National Jurisdiction. The International Journal of Marine and Coastal Law, 27: 449–480.

   Druel E. (2013) Environmental impact assessments in areas beyond national jurisdiction. IDDRI, No. 1/13. [↑](#footnote-ref-1)
2. Elferink A.G.O. (2012) Environmental Impact Assessment in Areas Beyond National Jurisdiction. The International Journal of Marine and Coastal Law, 27: 449–480. [↑](#footnote-ref-2)
3. Druel E. (2013) Environmental impact assessments in areas beyond national jurisdiction. IDDRI, No. 1/13. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. Elferink A.G.O. (2012) Environmental Impact Assessment in Areas Beyond National Jurisdiction. The International Journal of Marine and Coastal Law, 27: 449–480 [↑](#footnote-ref-5)