

**TOWARDS A PACKAGE: A Workshop for delegates, civil society and industry experts regarding marine biodiversity beyond national jurisdiction: Informal event in Edinburgh, United Kingdom January 2020: Day 1 output**



**Workshop Summary:**

**This informal workshop aimed to facilitate an open, creative and practical dialogue regarding some of the issues involved in the actual BBNJ negotiations.** Each session began with two short presentations, which were followed by moderated discussion. It should be stressed that this informal workshop did not include representatives of all delegations to the BBNJ negotiations and should not be treated as having included or developed the firm position of any delegation or combination of them. This document is provided in the hope that it would be of assistance to all involved in the formal process.

The workshop goal was to explore the scope of opinions that exist, discuss the reasons underpinning differing views, and consider areas of possible convergence that could be built upon in the ongoing BBNJ negotiations, as well as areas of divergence.

**Reflecting the evolving and diverse nature of the ongoing BBNJ negotiations, the main output of the workshop proved to be deep and informed debate, mutual learning and exploration of possibilities.**



Workshop participants explored Marine Genetic Resources (MGRs), intellectual property (IP) rights and trade secrets; MGRs and digital sequence information; MGRs, access and benefit sharing; and capacity building and technology transfer.

**Key areas of discussion were:**

How to facilitate meaningful and equitable access to MGR in physical form, and the goal of everyone having the opportunity to participate in the benefits of MGR.

There were varying views about the extent to which MGR in digital form, and contextual information, should be included. Within this, there were arguments from some that digital sequence information should be shared free of charge, and that capacity for utilization of digital sequence information should be developed.

How to ensure that access to MGR *in situ* and in *ex situ* collections should be as open as possible. There were also varying views (reflecting the different positions on MGR in digital form) about the extent to which MGR in gene banks and access to information should also be covered, and the extent to which there should be references to IP rights on this point, including regarding references to open access and open source.

The role of disclosure of origin or source as a mechanism to identify products from MGR from the area beyond national jurisdiction. There was disagreement on whether these requirements and discussion about them belong in the BBNJ process and future BBNJ agreement or in WIPO or another forum.

On IP rights in general, there were arguments that a multilateral process should be adopted to benefit sharing and that there should not be an overly deferential approach taken to IP. Some suggested that restrictions on IP could be consistent with the international law of IP, given the flexibilities within the TRIPS agreement (part of the WTO) and the international consensus reached regarding copyright works and visual impairment at Marrakech. The view was also noted that restricting the power conferred by IP rights can be argued to have a negative impact on incentive to invest in and engage in innovation – which could have consequences for the benefits (and sharing possibilities) for health and other innovation which could come from work with MGR from BBNJ.

The goal of the access and benefit sharing (ABS) system being realistic, workable, cost-effective, and aligned with scientific practices and terminology, including the opportunity for scientists from developing areas to take part in research cruises and be linked to existing institutions where possible. Within this there was debate about whether the focus should be on values underpinning ABS or on operationalising ABS.

Track and trace approaches (which would be more formal “stick” based approaches) were considered by some to be difficult and expensive and not the most effective way to achieve benefit sharing goals. Some argued for a focus more on traceability (a more “carrot”, market-based approach) but there were some objections to this. There was a growing view that transparency around access to MGR may be needed to support appropriate sharing of benefits. This could be brought about through use of Obligatory Prior Electronic Notification, checkpoints, and/or incentives for keeping track of source/origin information.

There were views that meaningful capacity-building, sharing of MGR (and for some information), and cooperation in research improves scientific results and assists mankind as a whole.

It was argued that delivery of capacity-building and technology transfer should be based on an overall structured plan, including needs assessment and partnership, recognizing that a needs assessment itself requires financial investment.

Financial sustainability (leading to the receiving state’s need reducing) was argued to be key to capacity building and technology transfer. The GEF International Waters Programme was suggested to be a potential funding mechanism. One other suggestion was that industry/private sector financing should be explored, including from downstream companies such as from technology companies that use international cables.

Arguments were made for the importance of developing of new technologies, the need for open access to data and publications, and of the evolving nature of approaches to science within society. It was suggested that there was a need to balance knowledge, a precautionary approach where there were gaps, and the fact that although there are knowledge gaps, much is still known.

The above summary can be viewed alongside the following more detailed note. **The note reflects the manner in which the discussions developed, with presentations, provocations to frame discussion, and then the wider debate in which different positions were put forward and discussed. This should all be viewed in the context as noted above that no consensus was reached in the workshop but rather the workshop provided a space for exchange of views.** In conformity with the Chatham House Rule, names and affiliations of workshop delegates have been removed.

## **Session 1: MGRs & IP Rights & Trade Secrets**

### **Speaker 1a:**

Intellectual property rights (IPR): IPR should be considered for several reasons:

- IPRs are important because it is possible that patents could be obtained over MGRs. IPRs are an important part of benefit-sharing. Information which may be shared as part of the benefit sharing process could be the subject of copyright. In some countries, such information could be the subject of database rights.
- IPRs can exist in respect of equipment and technology used to obtain and operate over repositories. Deep-sea technology that is used to establish the DNA *in situ*, could be the subject of IPRs.
- IPRs could block technology transfer.
- The BBNJ agreement could engage with and limit IP rights and trade secrets – this is not in breach of international law and could encourage sharing of technology and create solutions for conservation of the environment.
- It was suggested to be unlikely that the restriction of IPRs in the BBNJ agreement would remove the incentive to innovate.

### **Speaker 1b:**

IP and disclosure of origin:

There are six propositions that govern the possible positions:

- 1. IPRs have incentive functions and allocative functions with a distributive function.** When one talks about the development of IP, different perspectives are taken. Developed countries tend to focus on incentive functions while developing countries focus on allocative functions. It has been argued since the early days of the TRIPS agreement that a “one size fits all” IP resolution has not worked internationally. To insist on a similar arrangement in the BBNJ process suggests is suggested to be on the wrong side of history and equity.
- 2. Boundaries of the subject matter? What is actually being protected?** The BBNJ process has been hamstrung with the use of the term ‘genetic resources’ which has become outdated. This is because physicality and location which is intended in the meaning has become very fluid in the BBNJ process. It was argued to be time to proclaim the death of ‘genetic resources’ as a meaningful legal term and that the negotiations in March 2020 should take account of that.

3. **The relationship between commons and IP. “Commons” is not the absence of ownership but rather joint ownership.** It is from this notion, legally and jurisprudentially, which that the idea of moderating and controlling IPRs comes.
4. **The extraordinary deference to IP in multilateral processes.** This is a deference that is being broken down robustly and vigorously in domestic conversations about IP by academics and from the policy angle. It was suggested that the BBNJ process should pay attention to the last thirty years analysis on intellectual property. If not, when it comes to implementation, most countries and institutions would continue to defer to IP and private rights.
5. **Research on the Marrakech Treaty.** There, the architecture of limitations and exceptions to copyright law was used to address a problem - as books are copyright protected, it is not possible to convert them into formats that are accessible to blind people. It was suggested that the language of limitation should be pursued for the BBNJ agreement: it is familiar to IP, and it is something that is familiar enough for universal application. This wording is not current draft BBNJ treaty, but the PSIDS submission uses the language of the Marrakech treaty and it was suggested that further regard be had to this.
6. **The relationship between benefit sharing and IP?** The direction of travel in other legal arrangements and institutional frameworks shows that there is a dawning realisation by many that the bilateral framework approach with a focus on private rights and contract law has not worked. It was suggested that this has in fact led to a scenario of very diverse domestic measures that is difficult to navigate. A new direction of travel seems to be a streamlined, multi-laterally enforced benefit-sharing mechanism which, it was suggested, is the way forward to reduce transaction costs when it comes to implementation.

### Questions and discussions:

#### 1. **Should the BBNJ agreement engage with Intellectual Property Rights?**

It depends on what is meant “should”. There could be an acknowledgement that IPRs exist, however some countries feel strongly that IPRs must be respected in the BBNJ instrument and would support such a reference but nothing more.

**2. There are a lot of international IP agreements. So, the questions could rather be: if there are issues of IPRs, should the BBNJ process be the right forum to address the IPRs related issues?**

- It was suggested that because these issues are quite complex, the BBNJ process is not the best place to introduce IPRs in the context of genetic resources. There is a risk of this slowing down the progress made so far in other aspects of the BBNJ discussions.
- There was a view that while it should be recognised that IP exists, this should not necessarily lead to a new text in respect of IPRs.

**3. Why engage with IPR at all?**

- There was discussion regarding how one could ensure open access if the agreement does not engage with the prospect of IPR over relevant material.
- There was the view that the fact that mediocre IPRs exist, does not mean that IP necessarily need to be mentioned in the BBNJ agreement.
- Some negotiations in other fora regarding MGR have specifically excluded their application to ABNJ. In this context, inclusion of IPR in the BBNJ agreement could create clarity in this space. Leaving it out could be seen as one set of countries overly imposing their views on others.
- Arguments for engagement with IPR were suggested to be much wider than disclosure of origin and source of genetic resources in the patent context. Information about MGR could be the subject of a copyright infringement or be a trade secret. This could have an impact on delivery on benefit sharing and could warrant further exploration.

**4. What does open access mean for the actual BBNJ negotiation in the context of IPRs? Is it in terms of accessibility to public data, or is accessibility without terms and conditions attached?**

- It was suggested that open access can mean that there will be no IPR or that the owner of the IPR will allow some form of compulsory licensing. If benefits arise from IPRs and if the IP owner can prevent the sharing of these, then it was suggested that it may be useful for the agreement to be clear as to how this would be addressed.

## 5. How can IP law relate to the sharing of databases?

- It was noted that another meaning of 'open access' could be that the material is to be available 'free of charge' or 'free of charge for some purposes'. If either of these is what is meant in the agreement, then this should be made clear and the impact of copyright on this addressed. Otherwise there could be a risk of the agreement leading to the establishment of a database and differing views on how this is to be shared and on what terms. And if the plan is that there is to be no reliance on IP rights then questions of funding of the database may also arise.
- It was argued that views on whether material should be shared on an open access basis can be intertwined with whether the information is seen to be of value now or in the future. This issue was suggested to warrant further discussion.

## 6. What approach should be taken to disclosure of origin?

- It was suggested that discussions should cover both origin and source. There was a view that an agreement needed to be reached on this, but it was suggested that this need not be done in the BBNJ forum. It was also noted that some countries do have national patent systems which engage with disclosure of origin already.

## **Session 2: MGRs & Digital Sequence Information**

### **Speaker 2a: Traceability vs track and trace: which approach adds more transparency to the process?**

It was suggested that the terms "information" and "materials" have been used interchangeably in the BBNJ process and that should not be the case. It was argued that once information is out, nothing stops the next person from accessing or duplicating same at no extra cost, whereas with physical material it is not easy to get same information from the same location. With open access, information can be easy to share, whereas materials are easy to keep 'behind closed doors'. It was suggested, therefore, that both should be covered in the BBNJ agreement and that this should be done separately.

For scientific purposes, it is necessary to record the GPS connection of samples collected. The question is then what is done with this across the supply chain.

## Two options were presented:

1. **Track and Trace:** this is like delivery company model with barcodes. At all stages, this can make it possible to know where the material is located, and it is a very onerous process.
2. **Traceability:** likened to a car recall system. It is possible to find out where the material came from by refers to the original tracing number of the product.

It was suggested that a database of *ex situ* materials, with a unique identifier, would ensure that the material could be traced by being uniquely identifiable within a defined system. A due diligence requirement could be put in place to ensure that traceability steps were being taken in respect of materials.

## Speaker 2b:

Three key points were made:

1. **The importance of building on existing traceability mechanisms for Digital Sequence Information (DSI).**
  2. **The importance of populating the metadata (eg information about the physical resource, its origin and whether prior informed consent was obtained) for DSI traceability.**
  3. **The need for generating incentives for people to engage in the traceability mechanism.**
- The term “open access” here means that there is no restriction on accessing the information in the databases, but it does not mean unrestricted permission for further distribution and use if information is covered by intellectual property.
  - The presentation demonstrated how the open access chain can work in a traceability system.
  - Very positive reference was made to one study on DSI. This shows firstly that traceability to the original physical resource through metadata attached to the sequence under open access databases is much easier when there is a single country as opposed to multiple origins, and secondly that it is possible to include in metadata access permit details demonstrating prior informed consent for the original physical materials but only if there is a stable link in an electronic document and not a paper document.
  - It was suggested that a key point is that while the individual sequence entries have value, the greater value is often the context and the comparison between sequences. A traceability system building on existing open access DSI systems would enable one to achieve the advantages of benefit-sharing by monitoring the end products and use of data rather than monitoring the data itself as it moves along the chain of custody.



- What was noted as yet to be discussed was the idea of providing incentives for traceability such as market-based incentives and developing systems for scientific prestige options. Essentially, these incentives will not only improve the traceability of DSI but also improve the quality of the information stored in databases about the country of origin of the original physical materials.

### **Reactions, questions and discussions:**

- It was suggested that if there is a restriction on the sequence one wishes to use, one could use a sequence that is close to it – so it may not be possible to contain DSI in the way that has been suggested. The goal may be to ensure that information can be accessed without it being overly restricted.
  - It was suggested that using a sequence to trace another sequence can be quite a complicated system and may impede the open access system.
- 1. Might terms like “direct”, “substantively” or “proportion” based be useful regarding origin/source/ traceability?**
    - There was a view that an evaluation of those kind of terms could be useful at some point.
  - 2. Should making genetic information be accessible, ensuring that scientists from other countries have a chance to work with it, as part of benefit-sharing?**
    - It was suggested that once individual scientists are done with their data, it is important to recycle the information to make sure it is not lost.
    - It was suggested that the utilisation of the DSI and information available, and capacity building to assist in this, is important.
    - There are questions about the scope of MGR and whether it does and could cover differing views as to what may need to be covered by the BBNJ agreement: does it include bio-chemical properties, or does it include hereditary or genetically based materials only? It was noted that discussions have in the past explored derivatives and access to derivatives. The definition of DSI could extend to bio-chemical derivatives.
    - It was queried to what extent systems of traceability have been able to trace years of research and development, especially with a lot of collaborations going on in the industry. It was noted that the process could be more one of monitoring products from a system, rather than just monitoring every single data, and that this could be easier to trace.

- Differences were noted between information and access to information, and accessing material, as this will diminishes the more it is shared.
- It was queried whether, as an alternative to tracing all the way, there could be checkpoints to follow data to ensure that it can be readily accessed? It was noted that checkpoints exist for the Convention on Biological Diversity and other regulatory systems. It was suggested that it is not necessary to create inter-jurisdictional checkpoints for DSI at this point as this would further complicate the system.

### **Session 3: Access & Benefit Sharing**

#### **Speaker 3a:**

Many are concerned that so much energy is focused on the ABS part of the BBNJ package rather than the conservation objectives of the BBNJ agreement, which need additional focus. If radical approaches are proposed to ABS, it was suggested that this will lead to States not ratifying a future agreement.

It was suggested that data is valuable for those who are investigating biodiversity in ABNJ but that the benefit sharing models that are put forward are expensive and unrealistic. Some are concerned about the immense costs of implementing and running a database. A full track and trace system would need to sit alongside the Nagoya Protocol obligations. To ensure uniform implementation of any system, international infrastructure is necessary but there are questions about what would be obtained from the investment in it? It was suggested that the focus should be an agreement regarding MGR *in situ*.

For there to be a practical system, it needs to translate to those who work in that field (for example, scientists) and to be linked to meaningful capacity building that focuses on the countries that require this science. Currently, it was considered that there is a risk of fixation on research vessels and that there should be a wider focus on technology transfer and sharing. It was noted that some countries already share access to technology with their neighbouring countries and perhaps this could be done at a global level? Benefit sharing in this respect can also draw upon the Nagoya Protocol system.

#### **Speaker 3b:**

Four points were made:

## 1. Definitions and terms used are unclear and this can cause difficulties in interpretation.

Some of this arises from how far the BBNJ discussion can be suggested to have come. A lot of the discussions are now focused not only on economic value, but also scientific value, societal value and the cultural value of marine life. It was suggested that it is necessary to include these values in the preamble of the BBNJ agreement.

## 2. What are the benefits?

We have spent 5 years talking about benefits in the context of ABS, and there are still divergent views. It was suggested that there may be convergence on the following benefits:

- Cooperation during research.
- Participation in the outcomes of research
- Access to data
- Training/ capacity building
- The ability to translate the outcomes of scientific research

**All in all, these benefits are very science heavy, though the benefits are not scientific alone.**

The fact that these benefits are so science heavy means that there could be a blurred line between benefit sharing in the BBNJ agreement, and capacity building and technology transfer. This can be a positive thing as it enables us to focus on the conservation and sustainable use of biodiversity and the delineation between capacity building and benefit sharing should be discussed.

It was suggested that it is important to acknowledge that since 1982, there has been progress in ABS. The Intergovernmental Oceanographic Commission of UNESCO published criteria and guidelines for technology transfer in 2003-2005 and there is now discussion about these being operationalised. This can take time and putting clearing house mechanisms to practice takes time: how can the BBNJ agreement be an opportunity to streamline these efforts?

It was suggested that the BBNJ agreement needs to provide an enabling environment, to be a forum which enables a more meaningful and informed discussion about scientific capacity and regarding how to increase technological capacity.

- ## 3. Best Practices Approach:
- it was suggested that this approach in the science community is a good start, and that this would include access to data and sharing information. It was suggested that there is much room for improvement and there is scope to explore how the

BBNJ agreement can help to streamline best practices through a forum to discuss incentives to bring them about.

- 4. Mechanisms to make this happen:** it was suggested that the Clearing House Mechanism suggested in the draft BBNJ agreement is positioned to deliver a crucial role. Discussion would be beneficial on conceptualising what the Clearing House Mechanism would do with regard to benefit sharing, participation in science and sharing information. It was suggested that the agreement should encourage real participation amongst scientists, not just the passing of information.

#### **Reactions, questions and discussions:**

- It was noted that there are so many different perspectives, as some are of the view that there is still real scope for meetings about benefit sharing. There were views that there is some resistance to those seeking to explore benefit sharing in the negotiations, including a focus on track and trace system not being the best approach. There did, however, seem to be a convergence on the need for capacity building and technology transfer in the BBNJ agreement.
- It was suggested that if a track and trace system is not the best way, there is the view that there needs to be some method of tracking hence traceability- the information would be less costly, and it could track derivatives beyond national jurisdiction. It was argued that if they derive from beyond national jurisdiction, then it is owned - and therefore should be shared by everyone.
- It was suggested that a key question is how scientific issues can be addressed within a legal framework? There did seem to be agreement about the need for capacity building to level the playing field so that the scientific research that is being undertaken can be expanded to developed and developing countries with the intent of assisting mankind as a whole.

#### **1. How can the BBNJ agreement achieve the goals /objectives of ABS?**

- It was noted that the BBNJ agreement works as a package, and different elements should not be approached distinctly, although it was suggested that there is a place for capacity building to run across all elements. It was suggested that the agreement needs to build on the original expectation of UNCLOS: at present important questions are how to approach monetary benefits as opposed to non-monetary benefits, and whether it should be compulsory or voluntary, rather than engaging with how the benefits can be derived.
- It was argued that key challenges are that there is no common agreement as to the foundation of access, the meaning of utilisation and what would trigger benefit sharing in the BBNJ

agreement. It was suggested that this all stems from the fact that this would not be ABS in the way that the world understands it under the Nagoya Protocol, because there has a fundamental divergence on the ownership of MGRs in areas beyond national jurisdiction. This is something on which there have been struggles with over the entirety of the BBNJ discussion.

- It was suggested that given the differences with the Nagoya Protocol, access to MGRs should be unrestricted. Much of the material in article 10 may better sit in article 11, and it was suggested that it should be made clear that the approaches to be taken to separately, e.g. *in situ* and DSI.

## 2. How should ABS be defined?

- It was suggested that it is really difficult to understand ABS, without understanding the other aspects of the BBNJ agreement.
- There is also the question of how the ABS definition in the BBNJ agreement sits alongside other agreements. A country may also have obligations under the International Treaty on Plant and Earth Resources for Food and Agriculture (FAO Treaty) which uses a multi-lateral system. Could that be a valuable model that that could be extended for ABS in the BBNJ agreement?
- It was noted that the present approach to MGRs is a first come, first served approach. In an area that is not owned by anyone, this means that those that have the opportunity to access MGRs would benefit tremendously. It was suggested that this should not be formalised in the BBNJ agreement, as this would not be equitable to all parties, given the view that MGRs are a common good.

## 3. Access issues

- It was suggested that should not be a misdirected approach to access, as the area beyond national jurisdiction belongs to everyone.
- A different view was that there needs to be some form of regulation of utilisation of MGR found in BBNJ because the resources belong to all of us. It should not be the case that some should have access, because they have the means, and others should not have access because they lack the means. If everyone is able to have access to utilise it, it benefits everyone. It was suggested that there is a need for a mechanism to enable everyone to derive benefits from MGR that are found or derived from areas BBNJ, which is not cumbersome.

#### 4. Opportunities for levelling the playing field:

- It was suggested that more steps are taken to get to know the scientific community who have the skills and technology, and are trying to build by inviting scientists from all over the world to participate in the process. Marine scientists are devoted to knowledge and the ocean, they do not see barriers and legal delineations - they just need funding for more research and information sharing.
- It was suggested that concrete obligations are place on sharing data to ensure that benefits are widely derived. It was also noted that this would have implications for some large countries who invest a lot of money in science and costly databases are really costly – attempts are being made, however, to have regard to the needs of other stakeholders and to see how the system can be developed most effectively.
- One view was that an obstacle to pursuing this debate has been reluctance by some to have a conversation about monetary/commercial benefits.
- It was argued that the goal of global equity supports enabling everyone to be able to use the information gathered, not just to collect it. It was suggested that as a starting point, 'utilisation' needed to be understood for a system of appropriation and benefits to be developed.
- Another key question was argued to be the scope of the obligation of benefit sharing. Should there be compulsory benefit sharing obligations and triggers for monetary benefit sharing? What, when and where should be traced? Can it be established when binding sharing obligations under the BBNJ agreement should be triggered?
- It was noted that if the benefits from MGR in the high seas are said to be so little, then why are some countries taken particular approaches to their regulation?

#### **Session 4: Capacity Building & Transfer of Marine Technology**

##### **Speaker 4a:**

Developing robotics helps deep sea-engineers work towards cheaper solutions, but the technology requires know-how and technology transfer comes in here. New technology comes with its own challenges such as maintenance and high investment capital. Working in the deep sea is a high risk, high gain challenge so the more complicated, and the higher the risk, the more potentially rewarding. Reliability of new technology is also a challenge.

International capacity building and collaboration is required to achieve. This requires heavy infrastructure both from the developing side, where this is sent out to work and on the receiving end. Open access/ data sharing is a way forward and a challenge is that data infrastructure is expensive.

## Recommendations:

1. **Worldwide collaborations:** this requires a framework that would also create some funding and support.
2. **Increase to open access and data sharing and technology transfer.**

## Speaker 4b:

It is important to look beyond the initial data collection/ sample collection because states need to be well-informed to engage in proposals, participate in debate and be involved in monitoring.

Query whether there is a collective opinion on capacity building? Marine scientific is expensive and needs a proper funding regime. What is the role of the industry in this? Is there a role for industry in capacity building and technology transfer arrangements? It was suggested that industry should be more involved and that there needs to be a way for the industry to recognise and prioritise capacity building and technology transfer for all countries. Not every country needs to be involved in research / process raw data, but capacity building and technology transfer should be prioritised.

It was also suggested that open access needs to include access to scientific publications, figures and papers, even those belonging to research houses. A real scenario is where one is not with an academic institution and may not have access without paying a fee, and that hinders open access. There is an enormous opportunity to gain more from capacity building in these respects.

## Questions and Discussions:

### 1. Capacity building

- It was noted that capacity building is cross-cutting and is an enabler for the other topics. From a developing country perspective, this is one of the areas of UNCLOS which can be considered to be unfulfilled. Present numbers regarding capacity building in the ABNJ, suggests that there is no systematic approach, rather there is much ad hoc activity. It was suggested that an important starting point is to address financial sustainability.
- One view is that capacity building is needed to address questions of competency. Otherwise imbalances seen regarding MGRs, most consumed seeds and patents on the human genome will continue. However, very few scientific expeditions in the high seas are driven by pharmaceutical companies and most of their developments come from serendipity or exchange of material which is already *ex situ* in freezers (hence the need for a traceability process). It was suggested that capacity building should be concerned more with building molecular

biology and bioinformatics centres in different countries. It was suggested that this, and simple technology transfer, is much more important than very expensive marine biology work.

## 2. Finance mechanisms and funding for capacity building

- Financing will be critical, and there has been limited engagement with it – there was one workshop that addressed financing in the last 6 months with regard to BBNJ, at the World Ocean Council. There is a long way to go in these respects. One possibility for action is through the GEF International Waters Programme.
- There is also the question of involvement of expertise e.g. Torsten Thiele and engaging with governments and with industry. Some concern was expressed at the lack of industry and private sector involvement in BBNJ capacity building. The whole purpose behind SDG17 is cooperation across different sectors. At the Our Oceans conference, industry really seemed to be open to playing a role.
- It was suggested that guidance could be taken from UN agency models of capacity building at national levels, specifically involving a common methodology and monitoring to come up with something that is really viable and effective.
- One of the realities is that it is a lot more challenging to create opportunities for capacity building in areas ABNJ because of the nature of the subject. The logistics and costs of capacity development is higher than what is familiar. Also, scientists are having cuts in funding available for such research, and the private sector engagement is becoming a real need in this regard. Some possibilities could be through reengagement with rich celebrities and technology companies using cables. There is a need to draft the agreement to incentivise and involve with science and the private sector.

## 3. A Clearing House Mechanism?

- Clearing House Mechanism was argued to need a human element to it, in order to result in a meaningful capacity building - web-based presence alone is not enough.
- One of the things to recognise is how fast technology is changing. Another thing to recognise is the changes in remote sensing, artificial intelligence and the monitoring of activity. In terms of negotiating the actual BBNJ agreement, it is important to understand those changes and how fast they can happen. This can also be a cross cutting issue, with some possibilities potentially involving activities in Marine Protected Areas. Should some areas of the Ocean be left untouched? It was suggested that far-reaching thinking is needed as part of the negotiation process.



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The workshop goal was to explore the scope of opinions that exist, discuss the reasons underpinning differing views, and consider areas of possible convergence that could be built upon in the ongoing BBNJ negotiations, as well as areas of divergence.

**Reflecting the evolving and diverse nature of the ongoing BBNJ negotiations, the main output of the workshop proved to be deep and informed debate, mutual learning and exploration of possibilities.**



Workshop participants explored Environmental Impact Assessments (EIAs), balancing conservation and sustainable use, multi-stakeholder engagement and general principles and pragmatism for a new BBNJ agreement.

**Key areas of discussion were:**

There is a need for baseline data for EIAs. It was noted by some that deep-sea data can be difficult to obtain, and that scientists are trying to fill knowledge-gaps using predictive modelling approaches and newly emerging technology.

The role of the precautionary approach/principle and weight of evidence methods when data is insufficient.

The detail of the EIA and Strategic Environmental Assessments (SEA) under the BBNJ agreement for example regarding definitions, including 'adverse effect' and 'ecological thresholds' and the place of long-term terminology and regarding anthropogenic impacts on ecosystems.

The importance of dialogue and cooperation amongst all involved in the BBNJ process and to find innovative ways to facilitate effective international collaboration and cooperation.

The place of the private sector and the suggestion that greater efforts should be made to bring them into the BBNJ process, including as sources of funding and deep-sea data, always bearing in mind that private sector goals may have a shorter-term focus.

Some calls for a balance between vague and ambiguous principles and preambular text (including possible widely encompassing language and the intrinsic value of biodiversity and the climate emergency) and highly specific texts to deliver progress in the actual BBNJ negotiations. It was suggested that the goal should not just be listing principles but understanding and unifying them in the detail and delivery of the BBNJ agreement.

The need for implementing measures to be considered, with calls for linkages to existing instruments and frameworks. Others called for more ambitious action, including the creation of a global body.

The proper place of traditional knowledge in and across the ABNJ process, and the extent to which lessons can be learned from traditional knowledge in MGR exploration.

The dynamic nature of the deep-sea such as from carbon-loading, deoxygenation and acidification and the extent to which the BBNJ agreement could cope with change.

The above summary can be viewed alongside the following more detailed note. **The note reflects the manner in which the discussions developed, with presentations, provocations to frame discussion, and then the wider debate in which different positions were put forward and discussed. This should all be viewed in the context as noted above that no consensus was reached in the workshop but rather the workshop provided a space for exchange of views.** In conformity with the Chatham House Rule, names and affiliations of workshop delegates have been removed.

## **Session 5: EIAs & Assessing Deep-Sea Ecosystems**

### **Speaker 5a:**

Further thought is needed for the EIA sections of the BBNJ draft text.

**Definitions are an important issue:** what is to be meant by serious harm or adverse effect and how is this to be measured to enable it to be understood.

**EIA guidelines minimum standards:** it was suggested that if there are low levels of evidence, minimum standards would be lower than best practices. It should be considered whether one should be more aspirational in respect of standards.

### **Speaker 5b: ATLAS and iAtlantic Project research on the willingness to pay for cold water coral protection: What do people really care about in the deep-sea?**

Ecosystems provide important services and benefits. Economic value of ecosystems in the deep is very broad and multifaceted. This includes 'use values' (direct use and indirect use); 'future use' values; and 'non-use' values such as bequest value (which speaks to protection for future generations) and existence value (people value cold-water corals even though they may never see or use them).

Surveys and workshops were undertaken, which stressed the decrease in corals and the slow recovery and growth rate of coral reefs. Seminars were conducted in Norway and Ireland regarding awareness and protection of coral reefs. It was established that people value coral resources and if the reef was suitable for fish and did not really care about oil and fisheries. Responses from Canada, Norway and Scotland were assessed to see how distances affect the value placed. Results demonstrated that there is a strong mandate for conservation. People feel a sense of connection to the deep-sea and are willing to trade economic benefits for conservation.

### **Questions and responses:**

#### **1. How can there be a baseline for EIA without sufficient data?**

- Scientists are trying to fill knowledge gaps and predictive approaches are vital. This can look at suitability of habitat and extrapolate from that to make predictions about where things may occur. Also, technology can be used to better understand remote areas of the deep ocean such as automatic and automated environmental DNA to gather geophysical and biological information.

- It was suggested that precautionary approaches should be taken as there is not sufficient data, and the information which is available can also be used.
- Within the precautionary principle, there have been some calls for a two-tiered approach (for example, some sort of initial examination that might trigger a full EIA).

## **2. How do scientists view the difference between EIA and SEA for the future? Is it possible to have impact from the community? How about problems of data exclusivity?**

- There is a very low base of knowledge and again there is a place for thresholds. The threshold is currently significantly harmful effect. The case law in international law (e.g. Pulp Mills Case involving Argentina on trans-boundary environmental impact assessment) set a low threshold of significant impact and at EU level it is of direct significant impact. It was suggested that if the BBNJ process considers that a lower threshold is needed to trigger EIAs, this needs to be made clear.
- This is also the view that from the legal perspective, the very low baseline of knowledge should trigger the application of the precautionary approach.
- There was reference to a modality called the weight of evidence, which qualifies scientific opinion in the absence of hard science. It was suggested that this provides a very important opportunity to understand other ways to measure success and move to ecological end point goals which could be incorporated into planning.

## **3. What could be the role of traditional knowledge under a future agreement?**

- It was suggested that the question to be answered is 'what is traditional knowledge in MGRs?'
- It was noted that traditional knowledge was more often linked to issues that are closer to shore. It was suggested that the more important question to ask is whether there should be considerations on how the actions would impact coastal communities rather than traditional knowledge of actions of the coastal communities.
- In some parts of the world traditional knowledge can be useful, but it was suggested that this does not mean that it should be covered throughout the BBNJ agreement. It was suggested that would be more useful for indigenous peoples to have traditional knowledge referenced specifically in specific parts of the BBNJ agreement.
- Traditional knowledge, such as the locations of species in areas beyond national jurisdiction, can be used to locate important species. There are also examples of traditional navigation practices in the Pacific for example location of certain species and certain living creatures that can help lead in the discovery of marine genetic resources. From this perspective, it was argued that traditional knowledge does have a place in the BBNJ agreement, and it was suggested that a general reference to traditional knowledge should be incorporated throughout the text.
- Traditional knowledge was noted to very much have a place in policies considering developing countries – in particular UN Development Programme projects always take into account traditional knowledge.
- Another view was how to get traditional knowledge flowing through all these different processes. In the CBD there has been an effort to reach out through various organisations to reach out to the local communities to get them to contribute to local knowledge. This was noted to have been a challenging process because indigenous regions have their own different indigenous protocols and it is a matter of experts working together to try and reach out to get the information.

- It was suggested that EIAs should give consideration to local indigenous communities rather than just focusing on the traditional knowledge that can be obtained to access MGRs. EIAs consult with parties specifically involved within the process and therefore should give consideration to the impact on communities.
- 4. How can stakeholder participation be enhanced within the EIA process? EIAs cannot consult with everybody. What stakeholders should be included?**
- EIAs need to provide a basic framework and SEAs need to provide in depth assessments of particular areas.
  - EIAs are driven by individual projects and contractors. The contracted company carries the burden to carry the EIA and they have to follow best practices going forward. That learning may be interlinked. It was suggested to be important to scrutinise EIA when they are put out for public scrutiny.
  - It was argued that the disenfranchised parts of the world feel that their knowledge is not equivalent. There was also considered to be a big capacity issue. The EIA arrangements must include a process of engagement that is not burdensome on the researchers.

## **Session 6: BBNJ Principles and Pragmatism**

### **Speaker 6a: Five Points on Deep-sea Ecosystems**

- 1. The deep-sea is vast and vulnerable:** the deep-sea supports highly diverse and complex ecosystems. It is important to sustain the diversity of the deep-sea.
- 2. Rates of ocean change are unprecedented:** In the deep-sea, corals appear to be the most vulnerable to climate change impacts. The sea is the most vulnerable of all ecosystems as it absorbs most of the heat generated from global warming. The carbon cycle has been changed by humans and as a result, the complex structures of deep-sea coral reefs have been very rapidly dissolving.
- 3. In order for science to achieve its objectives and to provide the information needed to underpin management, basic scale analysis is needed:** Examples in the draft BBNJ text include, Article 6: promote international cooperation and marine research. Technologies tend to be expensive, although scientists are also developing low cost systems. Cooperation requires political will, unified international funding and open data to respond to the challenge of monitoring change across the global ocean.
- 4. Where is the Private Sector?** Does the private sector have sufficient engagement in the BBNJ process and in the EIA processes, and is representation via World Ocean Council working? There is a huge potential for expanding partnerships and data sharing, capacity building and stakeholder engagement.

## **Speaker 6b:**

Focussing on articles 2 (General Objective), 4 (Relationship) and 5 (General Principles & Approaches) of the draft BBNJ agreement, it was reiterated that these articles are mutually reinforcing. They were argued to be important to conceiving of what will frame the future treaty, noting that it should not be about maintaining the status quo but about filling existing gaps. To this end, attention was drawn to the need for a focus on the operationalisation of these articles, including through the obligations inherent in the draft BBNJ agreement, the institutional arrangements envisioned under Part VI of the draft BBNJ Agreement and how States Parties will be held accountable. By so doing, the BBNJ agreement's terms frameworks and mechanisms would then be operationalised to ensure accountability.

## **Questions and Discussion:**

### **1. Article 2 and the addition of 'long-term'**

- It was suggested that the concept of conservation is aimed at viability of biodiversity and its components and this should cover a long-term goal. It was suggested that this form of language makes sense compared to global and regional level instruments.
- Regarding references to "the long-term", it was noted by some that deep sea ecosystems in the deep-sea are very different in time and space. The impacts seen in the natural environment will affect ecosystems in the long term. To what degree will EIA incorporate the long-term effects and the services that are impacted overtime?

### **2. Principles and Approaches**

- There were differing views on the issue of principles and approaches. It was noted that listing principles is not the objective of the agreement. However, it was suggested that this issue should be discussed to ensure that the agreement achieves any agreed desired goals.
- It was suggested that if a lot of time is spent on which principles and approaches should be listed in a particular provision of the draft, that leaves less time to actually figure out the actual mechanism by which that principle or approach can be operationalized in the text of the BBNJ agreement.
- Another view was that consensus would be useful on the principles being advanced to enable work towards a shared and clearer understanding of definitions and terminology and its application with regard to obligations or rights in the draft BBNJ agreement.
- In many international principles, there was said to be a balance to be struck by getting the words in place and then developing the meaning of the word over time. This is useful as some do not have access to all the information about what the different components of the agreement might mean. It was suggested that the focus of the actual BBNJ negotiations is to cut down the ambiguities rather than being highly specific. This could then be implemented in diverse ways.

### **3. On pragmatism**

- It was noted that it is important to understand the aspect of dynamism. The actual BBNJ agreement does not address single impacts. The impacts of climate change are cumulative in time and space and there are significant issues which may exacerbate overtime. It was suggested that an agreement is needed which is dynamic and addresses changing situations, not just current trends; science and technology should be used to aid decisions, especially in the light of increasing greenhouse gasses and rising temperatures.

- Some participants commented that the deep ocean is more dynamic than is always realised, and it is experiencing fundamental changes. It was suggested that a global council is needed to enable issues of biodiversity, climate change and deep ocean change (such as carbon-loading, deoxygenation, changing temperatures and ocean acidification) to be explored through one lens, instead of having separate bodies as it stands now.
- Across these different bodies there are different enforcement mechanisms. It was noted for example that TRIPS includes the possibility of trade sanctions. These differences could lead to more emphasis being focussed on the protection required by one regime, rather than another, if they could conflict in some cases. Having one regime to handle issues may reduce clashes across global bodies.
- Pragmatism was argued to be important for Annex 1 (Criteria for ABMTs). It was suggested that although there is not as much data as would be desirable, but some interpretations can still be made – in this respect reference was made to the habitat map from the Joint Nature Conservation Committee for the EU.

#### **4. Cooperation and coordination between a future BBNJ COP and other institutions**

- A key element of the BBNJ agreement is to not undermine the effectiveness of other treaties. It was suggested that this does not mean that this agreement should 'drop the ball', as was seen with UNCLOS Article 206.
- It was noted that although there is reference to different agreements and institutions, the reality is it is the same delegates that are involved in the discussions. The BBNJ agreement may lead to political decisions being made to ensure that regard is being given to decisions being made in the different fora.
- The UN oceans mechanism was suggested to not be as efficient as it could be. The BBNJ agreement may provide scope for encouraging and strengthening the coordination mechanisms which already exist to support dialogue and cooperation.
- How can more people become engaged in the BBNJ process? Are there innovative ways to bridge the gaps in cooperation without oversubscribing the existing actors? Within this, it was suggested to be important to ensure that scientists are not being oversubscribed with respect to Regional Fisheries Management Organisations, technical and scientific work, Commission for the Conservation of Antarctic Marine Living Resources, the International Maritime Organization, and the Intergovernmental Oceanic Commission.

### **Session 7: Balancing Conservation & Sustainable Use & Multi-Stakeholder Engagement/the role of science**

#### **Speaker 7a: Evaluating Stakeholder Perceptions of the BBNJ Science-Policy-Interface**

It is important to understand how scientific information flows (or does not flow) through the policy-cycle. Although terminology such as, 'the best-available science' and 'science-based approaches' are used in the draft BBNJ agreement, there is little clarity on what this means. There is divergence around the operationalisation of science-based approaches.

Interviews were conducted at IGC 2 with stakeholders (including scientists and policymakers) and the results of the interviews designed a Q-methodology study. Four emergent factor groups were identified in the research. The implication is that science underpins the BBNJ process and the

future BBNJ agreement, yet it is poorly defined and there is minimal clarity on what science-based approaches would entail.

This demonstrates that best practice for science-policy interactions need to be researched and evidenced. There was also some agreement in this research regarding taking precautionary approaches without sufficient data, and that data collected from industry sources are perceived as credible and should be promoted.

### **Speaker 7b: BBNJ Process & the Private Sector**

Private sector involvement in the BBNJ process has been very limited, and it was suggested that this is because little oil and gas operations take place in ABNJ. It is likely that activities would take place under extended EEZ areas when continental margins extend further than 200 nautical miles.

#### **5 Key Messages for the Private Sector:**

- 1. Data acquisition in the high seas is currently underdeveloped and baseline data is scarce:** acquisition of data is a critical and time-consuming step to understanding the environment but is necessary to be able to design a project accordingly. Surveying the deep offshore areas is challenging and expensive in terms of specialised equipment, weather delays, and harsh seas. Parts of the oil and gas industry have experience in doing these things and this could continue throughout the entire life cycle of the project to increase the knowledge of the environment and the volume of scientific understanding.
- 2. The importance of strategic EIA:** EIAs are best practice and are to be carried out prior to opening any area for licencing for oil and gas by a competent authority. Their value is to see what baseline data there is, evaluate the sensitivity, decide what needs to be protected and whether there should be licensing or not. This is invaluable information for the oil and gas industry and helps to design campaigns.
- 3. The value of collaboration between industry and science to collect the data:** For example, in the 90s in the Shetland Islands, the Atlantic Frontier Environmental Network (a collaboration between government, industry and academia) conducted large scale environmental surveys to the North West of Scotland in 1996-1998. Other examples include the Southern project, offshore Angola, the Pamela project in Mozambique, the ATLAS Project, joint industry programmes with academia.
- 4. Data sharing is critical and initiatives for building databases of scientific information are welcomed by industry:** As industry, anything we collect in terms of baseline EIA data is given to the country's authorities and the authorities choose whether or not to make the data public. The majority of our members want to make the information publicly available but there are challenges. For example, one of the reasons industry members are participating in the ATLAS Project is to share the data collected.
- 5. A stable regulatory regime is essential to the planning and adapting of projects:** It was suggested that the BBNJ agreement needs to provide for technical discharge limits and permits, work authorisations, identifying competent authority and payments and fees and royalties. The projects in ABNJ should allow the private sector to interact with a national



authority as if the project was in a national EEZ zone. This would make it easier for the private sector to interact with a national government.

### **Questions and Discussions:**

#### **1. Clearing house mechanism and open access to data**

- It was suggested that insurance companies should be considered as key stakeholders. For EIAs, a deciding factor for a new activity would be whether the project can be insured. Understanding how the insurance industry deals with the issues of data and science and regulatory uncertainty is important.
- The ocean's risk and resilience lines are a big discussion within the G77 delegation. It was suggested that an interaction with that group would be one way to bring in industries.
- UK industry appears to have responded to its new oil and gas regulatory framework where data regarding location of oil is required to be disclosed more quickly to the regulator and is then to be shared more widely (even though this could be subject to IPRs and trade secrets). The new regime was introduced on that basis that enhanced sharing of information in the North Sea is a public good. Query what this might suggest for new approaches in the BBNJ process.

#### **2. How are standards set and accepted within the science/ private sector field?**

- This was noted to vary between industries. The oil and gas industry have the International Finance Cooperation standards, and also national government and regional level standards. There is also new technology such as environmental genomics. It was suggested that the science needs to progress and then more stakeholders could become involved. It was also noted that some national governments are more advanced than others in efficiently drafting new regulations. In some cases, a way forward may be a discussion and negotiation among various parties as to what should be the standard in a particular case.
- When EIAs are submitted, industry can choose to share them. If the idea is to share the data, then it is important that the file format and data models are consistent. To enable this, data should be collected in the same way to ensure consistency with international data standards.

#### **3. Are industries engaged and concerned in the BBNJ negotiations?**

- Some attempts have been made to enter into relationships with the private sector, but it is very difficult because private sector views are focused on the short-term, not long-term. It was suggested that the private sector should take a more active role in the negotiations and that many industries do not partake because they believe that they are regulated and protected by national government structures. Links need to be established between existing frameworks and the BBNJ framework: for example, businesses which work outside the EEZ zone and in this respect, there is an UNCLOS provision which requires mandatory benefit sharing for resource exploitation activity.
- The World Ocean Council exists however many industries do not work with this as an advisory body.
- Cable laying industries are involved in the BBNJ discussions. They are a fundamental industry and indeed have a small ecological impact footprint, however it was suggested that a less defensive approach would be used. Including companies who are now starting to lay their own cables (e.g. Google, Facebook) would be beneficial.
- It was suggested that there could also be engagement with activity in ABNJ in terms of renewables, and carbon capture and storage.

## **Session 8: Renewing Momentum & Motivation (Sustainable Ocean Resource Management)**

### **Speaker 8a:**

There is not sufficient urgency or ambition in the actual BBNJ negotiations. The scale of the problem has now become clear. Can the climate and ecological emergency be acknowledged in the preamble? This could boost morale during the negotiations and demonstrate where the intentions of the agreement came from. There has also been consideration in the actual negotiations of not maintaining the status quo and of the duty to not undermine. The preamble is there to give comfort for interpretation. On international cooperation, there are linkages throughout the package. UNCLOS expresses an obligation to operationalise the duty to cooperate and it was suggested that this should be made explicit regarding marine protected areas.

### **Speaker 8b:**

General observations regarding what is possible or desirable in the actual BBNJ negotiations:

- **To protect marine biodiversity, a call to move away from a sectoral approach of decision making where there is very limited cooperation.** This negotiation could be an opportunity for the protection of BBNJ and to change the ocean governance framework.
- **Article 4 of the draft BBNJ text:** it is not helpful that it focuses mainly on the intersection with other agreements (in the context of pressure from NGOs and deep-sea mining developments). There was suggested to be a tension with Article 6, which focuses on strengthening and coordination. How would this play out in practice? To gain more clarity, it was suggested that it is very important for States to ensure a robust process. It should be clear who does what, and where responsibilities lie, in well-defined roles.
- **A rethink about structure is needed:** as a bottom line, the latest report from IPCC on the cryosphere demonstrate how important it is that the ultimate BBNJ COP is able to fill the existing gaps for BBNJ.
- **The nature of the decision-making process:** it will be really important to separate out the process for designation of marine protected areas from the process to recognise special management measures designated by sectoral bodies. This is necessary to come to a clear and transparent process. The open-ended working group at Rio 20 did not achieve a lot of progress and resolutions were fully negotiated before the conference. It was suggested that in the actual BBNJ negotiations the preparatory process is used, with some leeway in the negotiation meetings and with policymakers having the opportunity to change perspectives during the actual negotiations.

### **Questions and Responses:**

#### **1. Preamble and the inclusion of climate change**

- There is preamble language in similar agreements which reference climate change so there are precedents for that already (see the Arctic Ocean Fisheries agreement which relates to all Arctic States, the EU and several major Asian Countries).

- A good way may be to reference other instruments, without specifying such wording in the BBNJ agreement.
- Preambles are critical things and require attention. It was suggested that the BBNJ agreement preamble should include what is important and worth reiterating and should include general guidelines for interpreting the entire treaty, to prevent contradictory interpretations.
- It was suggested that language of climate emergency could be used in the BBNJ agreement preamble. This could express a desire to act as stewards of the ocean in BBNJ areas on behalf of present and future generations. This language expresses a general principle which is focused on preserving the ecosystem.
- There was a view that the importance of biodiversity and its intrinsic value should be in the preamble.
- The mechanisms that this treaty would set up should be key to maintaining the momentum, and interest in the subject of the climate emergency.
- It should be established where climate concerns are actually figured out in the text of the BBNJ agreement. There was a view that this should include preamble language as well as regarding EIAs.
- The language in the BBNJ agreement is context specific, but if climate emergency is used, that would change the concern of the treaty in terms of interpretation. From a legal point of view, we need all-encompassing preamble language and determine what is reasonable and equitable.
- It was noted that the current draft BBNJ agreement can be argued to be really good from an international law perspective and uses flexible language which can be valuable from the perspective of interpretation.

## 2. General concluding comments

- A definition was suggested to be needed of 'access and benefit sharing' that is general, but specific enough that it can be achieved. The benefit topic is really complex and fully understanding this concept is key in defining the preamble. That is a really big piece of the puzzle.
- There is fragmentation of the biodiversity world between CBD and the marine realm. The CBD just launched their new first draft of their first 2025 diversity strategy and is very interested in marine protected areas targeted for 3030. The draft manages to articulate biodiversity conservation in terms of values of peoples.
- Language could be of value that shifts the focus from MGRs with its focus on benefit sharing, to conservation.
- Regarding marine protected areas there were said to be two options up for consideration: 1) the hybrid option which cooperates with existing treaties or regional bodies to introduce and execute implementing measures and, 2) the bottom-up model where regional bodies introduce the measures. The first option (hybrid option) was suggested to be preferable.
- Implementing measures were argued to be crucial, and there is quite a lot of scope for flexibility. A global body should be the one to create the measures, and this could also be able to be implemented domestically around the world, possible before a global body is introduced.
- There are a lot of existing treaties and we need to try to find linkages between them. The current draft can be argued to be a positive document from an international law perspective. The term 'undermine' is powerful and very valuable. It does not provide that the BBNJ agreement must give way to all existing treaties but rather that it should seek not to undermine the intentions. Arguably, it still allows for ambition and a move away from the status quo.