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MARIPOLDATA Reading Group

Rights of Nature and the relevance of traditional knowledge of indigenous Peoples and Local Communities in BBNJ

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Guest Speaker: Mr. Clement Yow Mulalap, first author of the Paper “Traditional knowledge and the BBNJ instrument”, as well as Legal Adviser at the Permanent Mission of the Federated States of Micronesia to the United Nations and part of the BBNJ negotiations since the Ad Hoc Open-Ended Working Groups.

Readings: Rights of Nature and Traditional knowledge: Perspectives for Global Ocean Stewardship (Harden Davies et al 2020) & Traditional Knowledge and the BBNJ instrument (Mulalap et al 2020)

1. Rights of Nature and Traditional knowledge: Perspectives for Global Ocean Stewardship (Harden Davies et al 2020)

The article Rights of Nature and Traditional knowledge raises a debate about the recognition of **legal rights of nature**. Legal rights of nature have been recognized in areas within national jurisdiction, but so far not for ABNJ. The paper examines national and subnational laws concerning the right of nature (Ecuador, Bolivia, Uganda among others) to inform the BBNJ agreement. The Rights of Nature concept recognizes **nature as a right-bearing subject**, rather than as an object controlled by humans. It proposes to base governance on the importance to respect nature and human activities must be managed so as to prevent destruction of nature. The Rights of Nature approach assumes that all humans have an obligation to protect the environment and the right to protect nature from harm- this stands in contrast to current state-based decision-making (e.g. in ABNJ). The paper argues that “if we change the legal status of nature, where nature has the right to exist, evolve and thrive” this is an opportunity to reframe the relationship with nature.

Characteristics of the Rights of Nature Approach

- i) Rights (nature has rights; Forests, rivers and nature as a whole have legal rights on national and subnational levels in various forms (Ecuador, Bolivia, Uganda)
- ii) Connectivity (all elements of nature, including humans are interconnected; recognizes forests, rivers and nature as connected systems)
- iii) Reciprocity (human use of nature requires respect and the maintenance of environment)

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Ina Tessnow- von Wysocki, July 2020



- iv) Representation and implementation (States not as the only entity to represent nature; Representation through human representatives/ national river committees or implementation by other natural persons)

The Rights of Nature approach is closely connected to indigenous philosophies and governance systems recognizing the interconnectedness of humans and nature.

Relevance of the Rights of Nature Approach for the BBNJ agreement:

- ➔ The Ocean would be seen as a rights-bearing entity, rather than resources to be exploited
- ➔ Rights of nature in BBNJ to enable global ocean stewardship; reinforce existing ocean governance norms and enhance the effectiveness and equitability of the BBNJ instrument
- ➔ The BBNJ agreement could bring states together “to act as stewards of the ocean in ABNJ on behalf of present and future generations”
- ➔ Inspire a shift in values: what knowledge is needed for ocean stewardship- apart from scientific knowledge also indigenous, local and traditional knowledge

Marine Genetic Resources (MGRs)	Area-Based Management Tools (ABMTs)/ Marine Protected Areas (MPAs)	Environmental Impact Assessments (EIAs)	Capacity Building and Technology Transfer (CB&TT)
<p>BBNJ discussions evolve around the access and benefit sharing system without too much discussion about the intrinsic value of marine biodiversity itself</p> <p>Criticism of the focus on economic value of biodiversity, suggestion to move towards recognizing the intrinsic value of nature “common heritage of nature”</p>	<p>With a Rights of Nature approach, MPAs would be ecologically connected; ocean health not undermined- assessments and planning across boundaries to ensure that activities outside the MPAs do not affect ocean health within the MPAs</p> <p>Criticism of the draft text in regard to lack of consideration of connectivity and that states have looked at the package elements separately and focused on obligation for cooperation rather than on obligation to conserve and sustainably use marine biodiversity</p>	<p>Respecting ecological limits; strengthen environmental protection</p>	<p>CB&TT would be the “collective effort to strengthen shared capabilities”; investment in shared life-support system ; shift away from knowledge as property, to knowledge as a partnership between humans and the ocean (for conservation and sustainable use)</p>

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The recognition of rights of BBNJ could lead to:

- development of new principles; operationalization of ecosystem approach, precautionary principle
- stricter EIA standards, ambitious management measures
- support for a new framework for MGRs and more holistic CB&TT,
- allow for stronger involvement of NGOs in the process

Council of Ocean Custodians

The paper introduces the idea of a “**Council of Ocean Custodians**” for a wider range of people to speak for the oceans (including supervise and review effectiveness of MPAs, review EIAs, guide CB&TT implementation and implementation of MGR benefit-sharing) with the option of the Conference of the Parties (COP) to create such a body.

While the current system emphasises the use of the ocean’s resources, this new approach could guide the way to a more environmental interpretation of UNCLOS to prevent over-exploitation and enhance ecosystem resilience. This sheds a different light on the negotiations, as there is the call for including alternative philosophical thinking about our relationship with nature which is currently missing in international policy-making but indeed present on national and subnational levels and especially in connection with traditional knowledge of Indigenous Peoples and Local Communities.

2. Traditional Knowledge and the BBNJ instrument (Mulalap et al 2020)

(See presentation slides)

Q&A with Mr. Clement Yow Mulalap and Discussion in the Group

Diversity of Traditional Knowledge

There are discussions around the standardization of TK in international databases- e.g. concerning the Clearinghouse Mechanism of BBNJ- a data sharing platform on marine biodiversity in ABNJ, but to what extent would this be possible and desirable? TK holders share their knowledge in specific places and choose with whom they share this knowledge. Therefore they do not want to see their knowledge published on an online website. The way, the inclusion of TK would work in the Clearinghouse Mechanism would be that TK holders can signal that they have knowledge in a particular case and then whoever would like to get access to this knowledge would then make the contact with the TK holders who can pass it on.

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Legitimacy and status of TK

There is the debate of legitimacy of TK, particularly when in contrast to western science. In how far can TK only be recognized through the “proof” of western scientific knowledge, e.g. the sight of humpback whales in a certain region/season where it goes against prior scientific findings, would this finding need to be proven by science? There is the idea of TK holders forming a counterpart to the IPCC as a body for TK in climate change issues, to have no hierarchy between the different forms of knowledge.

Discussion also evolved around the question of the actual status of TK on the international stage and particularly in the BBNJ negotiations. While these negotiations are concerning areas beyond national jurisdiction, states are still the most powerful actors and the inclusion of TK is debated among policy-makers, leaving most of the TK in brackets (still to be negotiated in the treaty text). In many occasions, the inclusion of TK is mentioned “as appropriate” which reduces the status of TK significantly. “Where relevant” seems to be the better option, as this refers to relevance of TK in particular parts of the world and tries to not put it into a “lower hierarchy”. The standing of TK in the international negotiations, however, is still to be decided on in the coming session(s).

Moreover, a difficult and important political issue is the advocacy of TK by governments in an international forum, while at the same time not tolerating TK practices on the national level. In some parts of the Asia-Pacific Region for example there is no recognition of Indigenous Tribes on the national level. However, this is not the case for the Pacific Island States. If the national position is to promote TK then there needs to be a holistic recognition of their rights and practices.

Representation of TK in the BBNJ process

In the negotiations

TK can currently be represented in the negotiations through state delegations or through direct representatives as part of non-governmental organizations (NGOs). NGOs have an observer status in the BBNJ negotiations.

In institutional arrangements of BBNJ

There is the call that TK needs to be represented in institutional arrangements, e.g. in the Scientific and Technical Body with permanent seats. There are examples from other international agreements which can be taken as best practice examples (e.g. Local Communities and Indigenous Peoples Platform (LCIPP) of the UNFCCC and its Facilitative Working Group; see presentation).

In the Treaty text

There is the need for explicit reference to TK and its holders in the treaty text. PSIDS and other delegations calling for the inclusion of text in this regard are adding a reference to TK of Indigenous Peoples and Local Communities (to account for not only traditional knowledge, but also indigenous and local knowledge, as there are slight differences in preference by certain communities) right after the mentioning of best-available science/ best-available scientific information in order to not have a hierarchy of these different forms of knowledge but include them all on an equal basis. Another question remains concerning the legal language of the agreement (principle vs. approach). Importance was put on the availability of as much knowledge and as many forms of different knowledge when creating this international instrument to conserve and sustainably use the oceans, as well as the rights for traditional, indigenous and local knowledge and their holders.

Forms of TK relevant for BBNJ instrument

1. Connectivity
2. Environmental best practices
3. Traditional navigation
 - TK of Indigenous Peoples and Local Communities should be represented in the Scientific and Technical Body of BBNJ
 - Need for Consent of TK holders before TK is used
 - 2-way CB&TT instrument: scientists to engage with TK holders to gain a better understanding

The voice of the Ocean

The idea of a *Council of Custodians* (see Harden Davies et al 2020) includes the diversity of representatives of “the ocean”, apart from states, also NGOs, TK holders and wider civil society. While a specific reference in the treaty text to such a Council is rather unlikely, however, delegates can leave the door open to let the COP create it at a later stage. The PSIDS have already made a reference to stewardship, as they support this approach. TK holders are often speaking on behalf of nature. As nature has no voice for itself, such stewards can take this role.

Implementation

What to do to not only have the change “on paper”? There are still the pending options of binding modalities vs. voluntary guidelines. There needs to be detailed language for modalities in the agreement, or to have the COP decide on such to guarantee operationalization.

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