Sustainable Technology Transfer in a BBNJ/ILBI Context

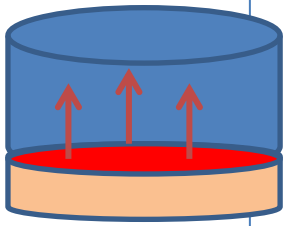
Overview:

1. Freedom of the High Seas vs. Common Heritage?
2. Purposes of „Technology Transfer"
3. Voices from IGC1
4. Sustainable TT from the Industry Perspective
5. Outlook

Disclaimer:

The following presentation sets out the personal findings and opinions of the author. It is not intended to provide (a) a comprehensive treatise on the subject, or (b) legal advice in any manner.

1. Freedom of the High Seas vs. Common Heritage of Mankind?



- „C.H.M." often understood as „owned and to be exploited by all together"
- „F.H.S." often understood as „free exploitation by everybody for himself"

→ conflict where they apply adjacently.

- In fact, neither principle gives **claims** to anyone.
- Common denominator: **Nobody is allowed to claim** any element under either régime as its own under exclusion of others.

→ In both cases, **mankind has a joint responsibility for a piece of the planet**, and thus for its common living conditions, its common future, in essence: for itself.

→ One of the means to live up to that responsibility is technology transfer.

2. Purposes of Technology Transfer in the BBNJ/ILBI Context

- **Terminology**: In this presentation, Technology Transfer and Capacity Building are treated as one, and abbreviated „TT".

- **Definition**: re. **Technology**, see „IOC Criteria on the Transfer of Marine Technology", Sect. A.2. More abstractly: „package of proprietary technical knowledge for the development, generation or operation of products, processes or services in a marine application". **Transfer**: „Any form of conveyance, be it by training, documentation, samples, or otherwise, on a one-time or ongoing basis, for either temporary or permanent use" (not from IOC)

- In the Law of the Sea in general, **two main purposes** of TT-rules emerge:

- 1. Benefit sharing
- 2. joint responsibility for the preservation of the marine part of the planet

In effect, the purposes often mix: „if you do it, do it right!" → Sustainable Use

2. Purposes of Technology Transfer …(2)

- **Type 1: Benefit Sharing/Wealth Redistribution**

  Obligation on industrialized states to let e.g. Developing Countries (and/or, an Enterprise acting on behalf) share technology in order to take part in the exploitation of resources.
  Example: Deepsea Mining: UNCLOS III Art. 144 & 1994 Amendment, Annex, Art 5
  Background: New International Economic Order of the 1970s et seq.

- **Type 2: „Responsibility"**
  Obligation on all states to share technology in order to e.g. preserve the environment, biodiversity….
  Examples: Environmental support for DCs: UNCLOS III Art. 202; biodiversity: Art. 16 CBD
  Background: Common awareness of environmental concerns (Club of Rome 1972; Stockholm Declaration 1972)

2. Purposes of Technology Transfer ...(3)

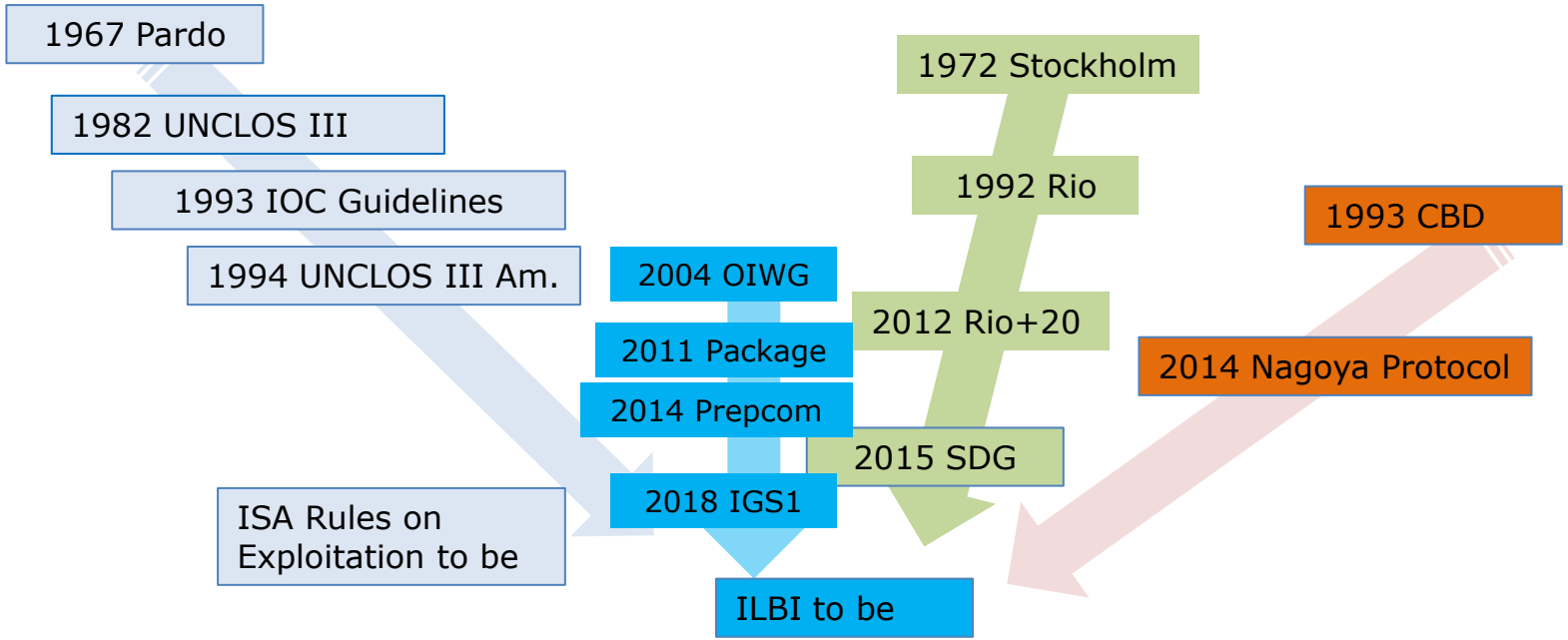
- **The „mixed" type for sustainable resource exploitation**

  Obligation on all states to share technology which enables an exploitation of resources by simultaneously preserving the environment to the largest possible extent.

  Examples: „Modern" instruments in preparation, such as the current **ISA „ Draft Regulations** on Exploitation of Mineral Resources in the Area", the **ILBI** under discussion here, and see also SDG14.a.:

  14.a Increase scientific knowledge, develop research capacity and transfer marine technology, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology, in order to improve ocean health and to enhance the contribution of marine biodiversity to the development of developing countries, in particular small island developing States and least developed countries

The „family tree" of BBNJ TT obligations



3. Voices from IGC 1

(Sept. 14, 2018; **Summary** by Facilitator Uludong, source: ENB; higlights by author)

- options to incorporate multiple CB&TT-focused **objectives** or a single objective linked to the ILBI overarching objective;
- convergence on an indicative, non-exhaustive, and flexible **list of CB&TT types and modalities** that can be updated;
- disagreement on **mandatory and/or voluntary** CB&TT provisions;
- the requirement for **needs assessment** to address regional characteristics, also on a case-by-case basis;
- the opportunity to draw on **UNCLOS Part XIV** (technology transfer) and the **IOC Guidelines**;
- different options for addressing IPRs;
- the need for an adequate, predictable, and sustainable **funding mechanism**, with options on establishing a new one or using an existing mechanism, like the GEF;
- options on roles and modalities for M&R; and
- the need for a **clearinghouse**, drawing inspiration from other processes.

4. Sustainable Technology Transfer from the Industry Perspective

To serve the „mixed" purpose, as well as to enable industry to live up to the demand, TT should be

- encouraged, but **voluntary**. Purpose, choice of technology, and conditions of transfer must make sense for the object as well as for transferor and transferee;
- selected/tailored to **demand**. Specific requirement description must match technology specification, in the interest of both parties and the environment;
- based, in each individual case, on explicit **contractual delimitations** of (a) the purpose, to which it shall be used, (b) the specification of the technology, and (c) the „deliverables" in terms of e.g. documentation, training, samples, component deliveries
- restricted to **mature technology**. The advantage of innovative elements in a new technology may be outweighed by the more failsafe operation of an older one, especially in fields with far reaching effects;

4. Sustainable Technology Transfer …. (2)

TT should also be

- directed to **educated and motivated recipients**. This can be either well trained workforce on the transferee side, or a joint venture with the transferor.
- subject to current **update**; both for the transferee and the transferor the experience of the other party gathered in the application of the technology can be crucial for success;
- transacted under **fair and reasonable conditions**. Industry does not work for free, and on the recipient side, a free technology is valued zero. If states feel need to grant preferential conditions to transferee states, they should compensate domestically. Application, ownership an respect for intellectual property rights (patents etc.) should follow internationally established rules;
- transacted – in its implementation - between **commerical entities, not states other than state enterprises**.

5. Outlook

- The Intergovernmental Conference will likely **take two more years** to complete; yet today there is **no „Zero Draft"** of an instrument/treaty;
- Both regarding exploitation of Marine Genetic Resources and preservation of biodiversity in the marine environment, TT will be affecting **crucial economic assets**, be it to owners/transferors or users/transferees;
- Unclear or idealistic wording in the treaty re. TT will neither help the involved industries on transferor and transferee sides, nor the environment;
- A **positive catalog of principles**, such as the one just shown, might be useful to propose in this early stage of drafting;
- The closer the proposed catalogue would come to **useable treaty language**, the better perhaps the chances that all or parts of it „survive" negotiations. Comments and reasons could be added in accompanying documentation.

Thank you for your attention!

ANDREAS KAEDE
ATTORNEY AT LAW

IN CO-OPERATION WITH
HAVER & MAILÄNDER RECHTSANWÄLTE
PARTNERSCHAFT MBB

LAMMSTRASSE 6
D-70839 GERLINGEN
GERMANY

TEL. +49 (0)7156 433 100
MOBILE +49 (0)173 928 70 20
MAIL ANDREAS.KAEDE@T-ONLINE.DE
WEB WWW.KANZLEI-KAEDE.DE