Reflections on the management of genetic resources in areas beyond national jurisdiction

6. Reflections on possible approaches to the management of genetic resources beyond national jurisdiction

While the protection of genetic resources could be attained via the global approach under discussion for protection of marine biodiversity, it seems that regulating the access and use of those resources would preferably require a specific initiative at international level.

Changes to the current state of play could take different forms. ,which are briefly presented below.

6.1. Action in the framework of the CBD

This would require agreeing on a broad interpretation of its scope via some sort of guidelines, a decision or even a new Protocol adopted by the Parties to the Convention.

The logic behind it would be that this is the forum which has the most expertise in organising access and benefit sharing of genetic resources worldwide and that the principles valid in areas subject to national jurisdiction should also prevail outside those territories. The difficulty would be however to adapt a system which is mainly designed to apply between States to a situation where the genetic resources are located outside any jurisdiction; the sharing of the benefits arising from the exploitation of the resources concerned would therefore have to be organised according to rules specific to that situation. Notably, this would require setting up an independent body vested with authority over genetic resources outside national jurisdiction, or empowering an existing body (such as the International Sea Bed Authority). Such an authority would issue authorizations for access and exploitation of genetic resources, possibly against the payment of fees. The income derived from the commercialisation of the resources or processes derived from those resources by the firms concerned could also be subject to a levy, which would benefit third parties, for example developing countries or research institutes.

The provisions on access and benefit sharing contained in the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, and the process under development in that framework, could be worth of consideration, in so far as this system departs from a logic based on bilateral negotiation between providers and recipients but should rely on an agreement to be accepted by all parties.

6.2. Application to genetic resources of the regime governing the management of mineral resources under UNCLOS

Anotherapproach, which is likely to be favoured by some developing States, would be to amend or interpret UNCLOS so that genetic resources are considered as common heritage of mankind and be assimilated to mineral resources from the Area. The sharing of benefits from their exploitation would be governed according to the same principles as foreseen in Part XI of UNCLOS, to be adapted the specific features of exploitation of genetic resources. This solution would ensure that resources from the international seabed are considered in a consistent manner, be they mineral or genetic, and provide for a comprehensive regime for their management. However, one should bear in mind that the current system for the management of the Area by the International Sea Bed Authority (ISBA) has not really been tested in practice so far. This option should also not lead to a reopening of the debate on the regime of the Area, which proved to be one of the most complex questions in the context of the adoption of UNCLOS.

A possibility to overcome this difficulty could be the adoption of a Protocol or of an Implementing Agreement.

6.3. Regional approaches

Other options include the adoption of regional conventions, covering different areas beyond national jurisdiction. On the model of Regional Fisheries organisations or regional seas conventions, rules would be adopted for the management of genetic resources in given areas by States interested in their exploitation. Benefits arising from the exploitation could be shared among the parties of the convention, according to allocation keys which they would define by themselves. The membership should in no case be reserved to the regional coastal states. The advantage would be to involve in the management of precise areas those States with an interest in the resources considered and create incentives for their sustainable use. The difficulties resulting from this choice would however be the fragmentation of the various regional solutions defined, and the risk that genetic resources around the world are not covered according to a similar degree of protection of various interests.

Regional approaches might be useful test-ground to address important elements such as environmental impact assessment related to the relevant activities but they can hardly deliver in relation to the expectations of developing countries on benefit sharing for the benefit of mankind (which remains an important driver of the negotiating process)[15].

6.4. Maintaining the status quo for the exploitation of genetic resources beyond national jurisdiction while focusing on their protection

The option of keeping the current status quo could also be considered, in view of the advantages generated for EU firms and research bodies.

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[15] At least, they should include innovative voluntary linkages with ISBA (e.g. arrangement for payment of fees from operators under the jurisdiction or control of the Parties to the regional agreement).

This would be a coherent approach if genetic resources in areas beyond national jurisdiction were considered to be “res nullius”, or that bio prospecting is already adequately addressed by UNCLOS provisions on the freedom of marine scientific research. This approach could also rely on the idea that any measures pertaining to areas beyond national jurisdiction should focus on their protection (within the wider context of protection of biodiversity outside national jurisdiction). Any supplementary step, especially on benefit sharing, would not need to be addressed through a binding regime.

6.5. The relationships between those options and the statute of genetic resources pursuant to international conventions on Intellectual property rights should also be assessed, with a view to ensuring mutual consistency.

Patent protection is essential to ensure that economic operators get financial incentives in return of the high investments required to engage in bio-prospecting activities. At the same time, particular attention could be paid to the scope of intellectual properties rights, in order to avoid restricting access to genetic resources for research purpose (for example access to collection of materials and basic knowledge about the biosphere).

7. An International authority responsible for management of genetic resources beyond national jurisdiction?

The first step in the process on a possible regulation of the use of genetic resources beyond national jurisdiction is to define which kind of regime, if any, the EU favours. Were the EU to opt for the establishment of a new regime the second step would then be to reflect on possible avenues for the management of this regime. This note only presents three possible options.

7.1. In the case of the assimilation of genetic resources in areas beyond national jurisdiction to mineral resources within the meaning of Part XI of UNCLOS, the mandate of ISBA could accordingly be extended to genetic resources from the seabed, and it would be for this body to manage the regime applicable to those resources.

Even if genetic resources were not strictly subject to the regime of mineral resources from the seabed under Article XI of UNCLOS but to a sui generis management system, it could be envisaged to have the ISBA in charge of it.

The advantage of entrusting ISBA with such missions would be to avoid a fragmentation of international bodies, to benefit from its expertise and existing structure (secretariat and decision-making processes are already in place) and to increase the activities of a body which is currently underused.

7.2. Another option would the setting up of an ad hoc body, which would be coherent if it was decided to establish an ad hoc management regime. Depending on the content of the regime, this could be assumed by an organ deriving from the CBD secretariat, or from the secretariat of other existing international institutions. The advantage of linking a new organ to existing organisations or processes would be to ensure consistency between their approaches and avoid a proliferation of organs in charge of interconnected matters.

7.3. If a regional approach were to be favoured, regional sea organisations could be entrusted with the task of managing the regime. One obstacle there seems to be that most of their current recommendations are not legally binding which would weaken the effectiveness of any agreed set of rules.

Another theoretical option would be to turn to Regional fisheries organisations. A major change in their mandate and expertise would then be required.