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Biological Prospecting: An update on recent policy developments at the international level

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1. Introduction

UNU and UNEP have regularly provided updates on recent development at the international level to the ATCM. Most recently at ATCM XXXI it provided a verbal update. At ATCM XXX UNEP submitted document ATCM XXX IP-67 Biological Prospecting in Antarctica: Review, Update and Proposed Tool to Support a Way Forward.

This document provides an update of developments since ATCM XXX or June 2007. Since then there have been relevant developments in many different fora. Of particular relevance to the topic of biological prospecting are developments in the Convention on Biological Diversity in relation to land and marine genetic resources, the United Nations in relation to marine genetic resources and the International Treaty on Plant Genetic Resources for Food and Agriculture. The following provides a summary of recent developments in each of these fora.

2. The Convention on Biological Diversity (CBD)

The ninth meeting of the CBD Conference of the Parties (Bonn, Germany, 19-30 May 2008) adopted decision IX/12 on access and benefit-sharing. In decision IX/12 the COP:-

- Decides that Annex I should be the basis for further elaboration and negotiation of the regime;
- Instructed the ABS Working Group to complete its work by 2010;
- Decides that the ABS Working Group should meet three times prior to 2010;
- Decides to establish three technical and legal expert groups to look at a series of issues laid out in Annex II to the decision; and
- Requests the Executive Secretary to commission studies and to invite experts to address the ABS Working Group on a number of issues.

Annex I contains the draft text of the international regime, with provisions on the objective, scope, main components and nature of the international regime.

Regarding the potential the scope of the International Regime on ABS currently contained in Annex 1 of decision IX/12, there are three references to the Antarctic Treaty Area: two in Option 1 and one in Option 3. They are:-

1. The first reference in Option 1 states in paragraph 3, “The international regime on access and benefit-sharing does not apply to (f) [Genetic resources located in the Antarctic Treaty Area.]”;
2. The next reference in Paragraph 5, “[In the further elaboration and negotiation of the international regime on access and benefit-sharing [special] [due] [consideration] will given to] (g) [Genetic resources located in the Antarctic Treaty Area.]”;
3. The final reference is in Option 3 which states in Paragraph 4, “Special consideration will be given to Genetic resources located in the Antarctic Treaty area”.

Thus, decision IX/12, provides three options:-

1. Exclude Antarctic Genetic Resources from the International Regime on ABS (i.e. option number 1 above);
2. Include Antarctic Genetic Resources in the International Regime on ABS (i.e. one of the implications of putting the square brackets round option number 2 above); and
3. Give “due” or “special” consideration to Antarctic Genetic Resources (i.e. options number 2 and 3 above).

Due or special consideration is not currently elaborated or defined in decision IX/12.

The Executive Secretary commissioned in accordance with paragraph 13(c) of CBD COP Decision IX/12, to examine how the international regime under the CBD could be mutually supportive of the activities of, and co-exist with, the Antarctic Treaty System (ATS) and the United Nations Convention on the Law of the Sea (UNCLOS). The study is available as document UNEP/CBD/ABS/GTLE/2/INF/1. The document is available from the website of the Secretariat – see www.cbd.int.

The Group of Technical and Legal Experts on Compliance in the context of the International Regime on Access and Benefit-sharing will meet in Tokyo from 27 to 30 January 2009. The seventh and eighth meetings of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing will also take place in 2009 (in April and November respectively), while the ninth meeting of this group will take place in March 2010. The CBD Parties aim to complete the elaboration and negotiation of the international regime on access and benefit-sharing before the tenth meeting of the Conference of the Parties in October 2010.

3. *The United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (the Consultative Process)*

At its eighth meeting, held from 25 to 29 June 2007, in New York, the Consultative Process focused on marine genetic resources (MGRs). It considered the nature of marine genetic resources and current activities in research and commercialization. The Consultative Process did not reach agreement on the elements to be suggested to the General Assembly for consideration under its agenda item on “Oceans and the law of the sea”. The Co-Chairpersons’ report of the meeting included possible elements suggested by the Co-Chairpersons to the General Assembly representing their understanding of the progress in the consideration of the elements at the conclusion of the eighth meeting of the Process. ^{1/} During the discussions delegations highlighted the important role of the CBD and UNCLOS. In relation to the CBD, it was indicated that its provisions on access and benefit-sharing do not cover genetic resources beyond national jurisdiction.

Report A/62/66 of the Secretary General, which served as the basis for discussions at the eighth meeting of the Consultative Process, addresses comprehensively issues related to marine genetic resources, such as various activities related to marine genetic resources and the services these resources provide. As regards the CBD, the report points out that provisions of the Convention do not apply to components of biological diversity beyond the limits of national jurisdiction and that, in accordance with article 5, parties are required to cooperate directly, or through competent international organizations, in respect of areas beyond national jurisdiction, for the conservation and sustainable use of biological diversity. ^{2/} The Report also indicates that in the context of its activities on access to genetic resources and benefit sharing, the Secretariat of the Pacific Environment Programme is planning on establishing a database of bioprospecting activities in the Pacific. It further states that work is also ongoing, with other partners, on monitoring and management needs for bioprospecting in Pacific Small Island developing States. ^{3/}

^{1/} See http://www.un.org/depts/los/consultative_process/consultative_process.htm for a copy of the report.

^{2/} See A/62/66, para. 201, which refers also to A/59/62/Add.1, paras. 254-260.

^{3/} A/62/66, para. 248.

The UN General Assembly took note of the report of the Consultative Process, and called upon States to further consider this issue in the context of the mandate of the Ad Hoc Open-ended Informal Working Group, with a view to making further progress on this issue⁴.

The 63rd session of the General Assembly decided to renew the mandate of the Consultative Process for two years. The next (tenth) meeting of the Consultative Process will take place from 17 to 19 June 2009 in New York. This meeting will consider “implementation of the outcomes of the Consultative Process, including a review of its achievements and shortcomings in its first nine meetings.”⁵ As marine genetic resources has been one of the more difficult topics tackled by the Consultative Process, it is likely that this issue will be revisited at the tenth meeting.

4. The Ad-hoc Open-ended Informal Working Group established by the General Assembly to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (the Working Group)

Both the first and the second meetings of the Working Group considered the issue of marine genetic resources beyond the limits of national jurisdiction. The first meeting of this Working Group was convened from 13 to 17 February 2006, at United Nations Headquarters in New York. The discussions on marine genetic resources focused on the legal status of marine genetic resources beyond areas of national jurisdiction. In their summary of trends, which were not negotiated and represented the Co-Chairs’ general understanding of the issues, possible options and approaches that emerged from the meeting, the Co-Chairs pointed out, *inter alia*, that this issue needs further discussions “in order to clarify how such resources may have to be regulated, whether existing tools and arrangements are sufficient or whether new tools are required for their conservation and sustainable use, including consideration of access and benefit sharing.” Moreover, the Co-Chairs highlighted the “symbiotic relationship between the genetic resources of the deep seabed, the biological diversity of the deep seabed water column and the non-living resources beyond national jurisdiction”. ^{6/}

The second meeting of the Working Group took place in New York from 28 April to 2 May 2008. The joint statement of the Co-Chairpersons summarized the key issues relating to genetic resources, *inter alia*, as follows:

- Delegations agreed that marine genetic resources provided important ecosystems goods and services to humankind. Therefore, ensuring the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction was essential.
- The importance of promoting scientific research on marine genetic resources was recognized in the light of its benefits in terms of expanding knowledge of the biodiversity of the oceans, as well as in discovering new substances of benefit to the livelihood and well-being of humankind.
- Some delegations suggested a number of areas for further research. They included the relationship between marine genetic resources and other resources; the level of activity actually occurring in respect of marine genetic resources in areas beyond national jurisdiction and the costs and risks involved; the marine biotechnology development process and the benefits arising from the commercialization of marine genetic resources; and the mapping of species and areas of potential interest for biotechnological application with a view to identifying appropriate measures for conservation and sustainable use.
- The need for capacity-building for developing countries to participate in, and to benefit from, activities related to marine genetic resources beyond areas of national jurisdiction was underlined, as was the need to enhance the sharing of scientific information and results. In that regard, reference was made to the usefulness of the International Seabed Authority Endowment Fund.

⁴ A/RES/62/215

⁵ A/63/L.42 section XIV

^{6/} A/61/65, annex I, para. 12.

- UNCLOS was recognized as the legal framework for all activities in the oceans and seas, including in respect of genetic resources beyond areas of national jurisdiction. In that regard, divergent views were expressed on the relevant legal regime on marine genetic resources beyond areas of national jurisdiction, in particular whether those marine genetic resources were part of the common heritage of mankind and therefore fell under the regime for the Area, or were part of the regime for the high seas.
- Notwithstanding the above, some delegations were of the view that an elaborated regime was needed within the framework of the UNCLOS in relation to marine genetic resources beyond areas of national jurisdiction. In response, other delegations stated that a new international regime was not warranted.
- In that context, some delegations proposed focusing on practical measures to enhance the conservation and sustainable use of marine genetic resources. It was proposed that such practical measures could address, among others, options for benefit-sharing. In that regard, several delegations expressed interest in considering a proposal to use the multilateral system developed under the International Treaty on Plant Genetic Resources for Food and Agriculture as a possible reference point for the discussions.
- Several delegations expressed support for the continuation of discussions on marine genetic resources beyond areas of national jurisdiction under the authority of the General Assembly and within the framework of UNCLOS. Reference was also made to the need to take into account the work under other relevant forums, such as the CBD, FAO, the World Intellectual Property Organization and the World Trade Organization.

The 63rd session of the General Assembly decided that the next meeting of the Working Group will take place in 2010 and that the Working Group will now be requested to provide recommendations to the General Assembly. The General Assembly also noted the discussion on the relevant legal regime on marine genetic resources in areas beyond national jurisdiction in accordance with the Convention, and called upon States to further consider this issue in the context of the mandate of the Working Group, with a view to making further progress on this issue⁷.

5. The Meeting of the State Parties to UNCLOS (MSP)

At their sixteenth meeting, held from 19 to 23 June 2006, in New York, several state parties to UNCLOS addressed the subject of genetic resources, in particular the need to consider new approaches on the basis of the UNCLOS to promote international cooperation and access and benefit-sharing. One delegation stated that in order to prevent a situation of unregulated and unilateral use of those resources, future negotiations should aim at adopting a binding instrument which would further elaborate the provisions of UNCLOS on marine scientific research on the basis of the principle of the common heritage of mankind. However, another delegation stated that existing instruments provided the framework for the conservation and sustainable use of biodiversity beyond areas under national jurisdiction and their strengthening and more effective implementation should be considered before taking decisions on the elaboration of new instruments. ^{8/}

At the seventeenth meeting (New York, 14-22 June 2007), in relation to the protection of the marine environment, it was pointed out that certain intrusive marine scientific research could negatively impact fragile ecosystems and resources of the deep sea, including marine genetic resources exploited for commercial purposes. Regarding marine genetic resources, some delegations stated that the regime for genetic resources was governed by UNCLOS and supported the idea that deep seabed genetic resources in areas beyond national jurisdiction were the common heritage of mankind. It was recalled that, regarding the regime established under UNCLOS, in Part XIII on marine scientific research, the distinction between scientific investigation, research and development, and exploitation of marine genetic resources, namely between pure and applied marine scientific research had never been accepted universally, since there was no perceivable difference in the activity or method.

⁷ A/63/L.42 section X

^{8/} SPLOS/148 para. 87.

At the eighteenth meeting, held in New York from 13 to 20 June 2008, the issue of marine genetic resources beyond areas of national jurisdiction, was briefly discussed. A delegation stated that the seabed, ocean floor and subsoil thereof and their resources in areas beyond national jurisdiction constituted the common heritage of mankind, and that there should be a fair and equitable distribution of the benefits arising from their use, whether for scientific or commercial purposes. A delegation stressed the need to assess the current existing framework and tools before engaging in discussions on a new regime for their management.

6. *The International Treaty on Plant Genetic Resources for Food and Agriculture*

The 2001 International Treaty on Plant Genetic Resources for Food and Agriculture purposes' are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use for sustainable agriculture and food security. The Treaty has 120 Parties.

The Treaty establishes a Multilateral System of Access and Benefit-sharing in which plant genetic resources for food and agriculture are placed for these purposes. The Contracting Parties have placed their genetic resources in the Multilateral System "in the exercise of their sovereign rights over their Plant Genetic Resources for Food and Agriculture".

Under the Multilateral System, plant genetic resources may be accessed for utilization and conservation in research, breeding and training. When a commercial product is developed using these resources, the Treaty provides for payment of an equitable share of the resulting monetary benefits, if this product may not be used without restriction by others for further research and breeding. If others may use it, payment is voluntary.

Access to plant genetic resources within the Multilateral System shall be facilitated and provided pursuant to a standard Material Transfer Agreement. In its Resolution 1/2006 of 16 June 2006, the Governing Body of the Treaty adopted the Standard Material Transfer Agreement.

The benefits of using these plant genetic resources are to be shared through information-exchange, access to and the transfer of technology, and capacity-building.

The Multilateral System is now a day-to-day operational system with hundreds of transfers of plant genetic resources made on a daily basis using the Standard Material Transfer Agreement. In response to this large volume of transfers and related activities the Secretariat of the Treaty is establishing, in collaboration with key stakeholders, information technology systems to support the implementation of the Multilateral System.

The International Treaty is also noteworthy because it provides an example in which genetic resources, within the scope of the CBD, are regulated by another system developed by another body, the FAO.

The second session of the Governing Body met between 29 October and 2 November 2007 and adopted a number of decisions on the operation of the Multilateral System.

At this session, the Governing Body agreed to include an interpretative footnote in the Standard Material Transfer Agreement to the effect that references to Annex I should not preclude the International Agricultural Research Centres ('IARCs') from using the Standard Material Transfer Agreement for both Annex I and non-Annex I material. This would permit IARCs to use the Standard Material Transfer Agreement for all transactions and significantly expand its usage.