

The Evolving Legal Regime on Marine Biodiversity Beyond Areas of National Jurisdiction

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Summary

- United Nations Convention on the Law of the Sea 1982
- Convention on Biological Diversity 1992
- Nagoya Protocol on Access and Benefit Sharing of Genetic Resources 2010
- Work of the Ad Hoc Working Group Meetings on Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction (ABNJ)
- Possible elements for a new international Implementing Agreement on conservation and sustainable use of marine biodiversity beyond national jurisdiction
- Way Forward

UNCLOS 1982

- UNCLOS-Constitution of the Oceans (Tommy Koh) but a Framework Agreement
- Basic provisions for protection on marine biodiversity
- Art. 119 - conservation of living resources in high seas.
- Part XI, Art.133 provides definition of 'resources in Area'
- Art. 136 - treats Area and Resources as 'Common Heritage of Mankind'

UNCLOS (Contd...)

- Marine scientific research(MSR) covered in Art.143 provides that MSR in Area shall be carried out exclusively for peaceful purposes
- Article 145 deals with “protection and conservation of the natural resources of the Area and the prevention of damage to the ‘flora and fauna of the marine environment’
- Art. 147 provides that activities in Area should be undertaken on basis of “reasonable regards/due diligence for protecting the marine environment
- Article 192 provides for an obligation to ‘protect and preserve the marine environment’

Work of the Ad Hoc Working Group
to Study issues relating to
Conservation and Sustainable Use
of Marine Biological Diversity ABNJ

Ad Hoc Working Group

UN Doc. A/RES/66/288 on Rio+20 “Future We Want” paras 158-177 on ‘Oceans and Seas’ and para 162 calling upon states to draw up a international instrument on regime for the conservation and sustainable use of MBBNJ by the 69th session, 70th UNGA session with adoption of post-2015 SDGS.

- Reports of Secretary General of United Nations reports A/60/63/Add.1, A/62/66/Add.2, A/64/66/Add.2 and A/66/70
- Reports of the Ad Hoc Working Group to study issues relating to the conservation and sustainable use of MBBNJ A/61/65, A/63/79, A/65/68, A/66/119, A/67/95, A/68/399, A/69/82, A/69/177 and A/69/780.

Ad Hoc Working Group (Cont'd...)

Some of the common elements drawn up from the views of members, observers, UN agencies, IGO'S and other participants of this AWG:

- Marine biodiversity constituted a fundamental component of life in oceans and Earth
- Impacts climate change
- Centrality of General Assembly in MBBNJ
- Legal framework should be within the framework provided by UNCLOS

Ad Hoc Working Group (Cont'd...)

Basic building blocks of the proposed Implementing Agreement would be:

- Fundamental principles
- MGRs (Access and Benefit Sharing)
- Area Management Tools(MPAs and EIA)
- Capacity Building
- Transfer of Technology
- Elements of Effective Legal Framework

Ad Hoc Working Group (Cont'd...)

Fundamental Principles

- Precautionary principle (Principle 16 of Rio Declaration)
- Eco-systemic approach(Integrated management for Conservation and Sustainable Use of sea resources)
- Cooperation (Vertical and horizontal)
- Equity (Access and Benefit Sharing of MGRs among developed and developing countries)

Ad Hoc Working Group (Cont'd...)

Marine Genetic Resources beyond national jurisdiction

- Part XI applicable only to minerals
- Part VII -Freedom of High Seas
- Global Implication of exploitation of MGRs by developed few
- Mapping of existing and prospective bioprospecting activities
- Monetary and Non-Monetary benefits

Ad Hoc Working Group (Cont'd...)

Area Management Tools(MPAs and EIA)

- Marine Protected Areas est. on scientific basis
- MPAs should not impede MSR or freedom of navigation
- Develop criteria/parameters for MPAs
- EIA a must for conservation and sustainable use of MBBNJ; Article 204 of UNCLOS -Monitoring effects/risk of pollution on marine environment
- Cumulative impacts of EIAs must be studied

Ad Hoc Working Group (Cont'd...)

Capacity Building and Transfer of Technology (TOT)

- Capacity or ability of states to undertake obligations, especially developing countries of critical importance
- Part XIV of UNCLOS on Transfer of Marine Technology
- Existing literature shows that 'Capacity Building and TOT' are fundamental requirements of all contemporary treaty regimes

Ad Hoc Working Group (Cont'd...)

Views on Elements of Effective Legal Framework

- Need for an Implementing Agreement- would guarantee legal certainty, predictability, uniformity and universal participation
- Agreement should be drawn within UNCLOS framework
- Agreement should compliment existing treaty regimes (CBD, Nagoya Protocol on ABS) and be without prejudice to states, not parties to UNCLOS
- Must include all building blocks seen earlier; others can be added

Ad Hoc Working Group (Cont'd...)

Views on Elements of Effective Legal Framework (Cont'd)

- Must fill regulatory gaps- regulation, governance, coordination and information sharing
- Regulation-CBD and Nagoya Protocol on ABS and UN Fish Stocks Agreement, inadequate in scope
- MSR does not cover or include MGRs as UNCLOS restricts its scope
- Part XII(Protection of Marine Environment); Part XIII (MSR); AND Part XIV (Development and Transfer of Marine Technology) of UNCLOS not fully complied

Ad Hoc Working Group Cont'd...

Views on Elements of Effective Legal Framework (Cont'd)

- States question legality and legitimacy of MPAs
- Some states prefer more political will and better streamlined coordination and effective implementation of existing treaty regimes
- Need for sharing of information on ecosystems, biodiversity and human activities beyond national jurisdiction

Way Forward for understanding elements of a draft text ...

- UNGA res. A/RES/69/292 need for a international legally binding instrument and establishment of PREPCOM
- New Agreement must include all building blocks identified by Ad Hoc Committee(MGRs, MPAs, Capacity Building, TOT and ABS)
- Need for an Implementing Agreement under UNCLOS or any other instrument
- State driven negotiation; issues of non-parties to UNCLOS

Draft Elements (Contd)...

- There is no simple solution- complex web, fragmentation of treaty regimes, regional mechanisms parallel treaty regimes
- Capacity building and TOT of critical importance to India and developing states
- Implementing Agreement must provide an Institutional structure like the ISBA to cater to the needs of all states, especially developing countries
- MGRs is not only about sharing of bioprospecting opportunities, but also non-monetary issues such as greater academic/scientific research for ensuring food security, health and science

Draft Elements (Contd)...

- UNCLOS remains an outstanding but framework treaty, must use it for drawing up for a comprehensive treaty protecting marine biodiversity beyond national jurisdiction
- New treaty would require great vision, dynamism and spirit of compromise to accommodate interests, rights and obligations of all states, just like UNCLOS did
- Ethical issues demand greater commitment to protect the marine environment for environment sake and well being of future generations

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THANK YOU