

Strengthening Ocean Governance: Marine Genetic Resources (MGR) in Areas Beyond National Jurisdiction (ABNJ)

Author: Kapil Narula

Date: 31 March 2016

The 1982 UN Convention on the Law of the Seas provides the legal framework for governance of the oceans and the seas within which, all activities must be carried out. Areas Beyond National Jurisdiction (ABNJ), are those areas of the oceans for which no one nation has sole responsibility for management. These include the 'High Seas' (areas beyond the Exclusive Economic Zone (EEZ) of a country) and 'The Area' (seabed beyond the continental shelf). In the context of resources, ABNJ includes the water column beyond the EEZ of a country and all living resources contained therein and seabed resources beyond the continental shelf of the coastal state. Approximately, 64 per cent of the surface of the oceans and 95 per cent of its volume fall under the ABNJ and conservation and protection of these areas is extremely difficult and challenging.

Advances in technology coupled with increasing demand for resources led to a gradual increase in the exploitation of the oceans for mineral and biological resources. While 'Marine Protected Areas' and regional fisheries agreements do exist, less than half a percent of marine habitats are protected as compared to 11.5 percent of global land area making ABNJ as one of the least protected areas on this planet. Over years, it was also recognized that the existing framework of regulations do not sufficiently address the conservation and sustainable use of marine biodiversity in the ABNJ. This is both due to 'legal gaps' as well as 'implementation gaps'.

Realizing the importance of marine biodiversity and inadequacies in governance of the ABNJ, an Ad Hoc Open Ended Informal Working Group was established by the UN General Assembly in 2004 to identify the gaps in the international legal regime. The last meeting of the working group was held in New York from 20-23 January 2015 and it recommended an international legally binding instrument under the Convention on the conservation and sustainable use of marine Biodiversity Beyond Areas of National Jurisdiction (BBNJ). As per the recommendations of the Working Group, a Preparatory Committee (PrepCom), has been established which would make substantive recommendations to the UN General Assembly on the elements of a draft text of an international legally binding instrument before the end of the seventy-second session in 2017. Based on these inputs, an intergovernmental conference may be convened under the auspices of the United Nations, to consider the recommendations on the elements and to elaborate the text of an international legally binding instrument under the Convention.

Marine Genetic Resources (MGR) which consist of the genetic material of deep-sea marine sponges, krill, corals, seaweeds and bacteria are attracting increasing scientific and commercial attention due to its potential usage in medicines and cosmetics. The existing Law of the Sea regime is silent on the MGR and only refers to the 'mineral resources' in 'The Area'. The ISA regulates all activities for exploration and exploitation of the 'mineral resources' in the Area which are the common heritage of mankind (Article 136). The definition of "resources" is limited to "all solid, liquid or gaseous mineral resources in situ, in the Area, at or beneath the seabed, including polymetallic nodules". On the other hand, part VII Section 2 of the 1982 UN Convention on the Law of the Seas deals with fisheries and marine mammals in the ABNJ but does not refer to other living resources, such as those living on the seabed, or benthic ecosystems living on or near seamounts, hydrothermal vents and cold-water coral reefs. The 1982 UN Convention on the Law of the Seas therefore does not specifically regulate living resources such as MGR, in the ABNJ.

Records show that only 10 countries accounted for 90% of the patents on MGR due to lack of physical access to ABNJ, technology to extract MGRs, and financial

resources for its commercial development. Developing countries therefore argued that free access to MGR, such as that applicable to the living resources in the high seas goes against the principle of 'just and equitable international economic order'. Hence countries from the developing world called for BBNJ to be declared as the common heritage of mankind and demanded that all countries should benefit from the economic returns by a process of benefit sharing.

These arguments are countered by developed nations which maintain that exploration and exploitation of MGR by undertaking activities such as bioprospecting falls under the right to conduct Marine Scientific Research (MSR), and is a part of the freedom of the high seas. Hence, under 1982 UN Convention on the Law of the Seas, MGR in the ABNJ are accessible to any state. Japan, US and Canada put forth the argument that research on MGR is costly and is undertaken by private companies. Hence, they have the first and the sole right to earn from the profits which they make out of commercializing MGR. Countries are also divided on the 'specific need' for explicitly defining the use of marine BBNJ and framing laws for its conservation and sustainable use as under Article 240 (d), 1982 UN Convention on the Law of the Seas already specifies that MSR has to be conducted in compliance with all relevant regulations including the general obligations for the protection and preservation of the marine environment.

It is evident that the countries need to forego some of their interests to arrive at a compromise solution in the larger interest of protection and sustainable use of the oceans. Exploitation of MGR can be governed in an arrangement similar to the control and administration of deep seabed resources by the ISA in which, half of the allocated area is handed back to the ISA after 15 years of the grant of rights to undertake exploration. The arrangement could explore mandatory joint development and scientific exploration so as to build the capacity of other developing countries. Sharing of revenues, access to relevant technology, data and research results from the development of MGR could also be explored between countries. An appropriate lay off time for exclusive commercial use of the research results from MGR could be decided and the IPR could then be surrendered for the welfare of humanity, is another model which could be explored.

The first meeting of the PrepCom is to be held from 28 March - 09 April 2016 at New York and this would be closely watched. Some of the above approaches would be explored, debated and would possibly move towards resolution. Notwithstanding the deliberations at the PrepCom, one thing is however certain that the agenda has moved on from 'exploitation' to 'sustainable use' of resources and ocean governance will play a key role in this transition.

* Kapil Narula is a Research Fellow, National Maritime Foundation, New Delhi. The views expressed are his own and do not reflect the official policy or position of the NMF, the Indian Navy or the Government of India. He can be reached at kapilnarula@yahoo.com