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Marine Genetic Resources in Areas Beyond National Jurisdiction: Access and Benefit-Sharing

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Abstract

At present, the international community has held many discussions on the exploitation and utilization of marine genetic resources in area beyond national jurisdiction, and this issue has gradually become a hot topic in the field of international law of the sea.

The first part of the main text introduces the negotiation dilemma of benefit-sharing of marine genetic resources with respect to the basic concept and legal status of MGRs in the ABNJ, and the second part summarizes the dilemma of negotiation on benefit-sharing of MGRs in the context of BBNJ, and focuses on the reasons for such dilemma. The third part discusses breakthroughs of the legal dilemma of MGRs in the ABNJ from a practical point of view and concludes with an assessment of the options within existing legal frameworks for accommodating an access and benefit-sharing system for marine genetic resources originating from ABNJ.

Keywords: marine genetic resources, international law of the sea, biodiversity in areas beyond national jurisdiction, United Nations Convention on the Law of the Sea

1. Negotiating Dilemmas in Benefit-Sharing of Marine Genetic Resources

The global legal order for the oceans and seas established by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) continues to suffer from gaps in the protection of marine ecosystems. The ultimate goal of filling the gaps in the MGRs-related provisions of UNCLOS and the CBD is to agree on a treaty to conserve the biodiversity of the ABNJ in order to achieve an international instrument for the BBNJ. The issue of conservation and sustainable use of MGRs in ABNJ is the focus of the implementation agreement.

There are three gaps in the current international legal regime for the protection and sustainable utilization of marine resources. The first is the definition of MGRs, the second is the undefined legal status of MGRs in the ABNJ, and the third, derived from this, is the issue of access and benefit-sharing of MGRs. The two fundamental issues, the definition of MGRs and the legal status of MGRs, are prerequisites for the negotiation and dialogue among States for the protection and sustainable utilization of ABNJ's MGRs.

1.1 The Basic Concept of Marine Genetic Resources Is Controversial

1.1.1 Unclear Definition of MGRs

MGRs generally refer to genetic material of actual or potential value originating from deep seabed communities. Scientific studies have shown that such resources exist both on the "high seas" and in the International Seabed Area (hereinafter referred to as "the Area"). The definition of MGRs in the "high seas" and the Area is particularly important because of the differences in the legal regimes of the different maritime areas. Within the existing legal framework, the definition of MGRs in the ABNJ is vague.

The 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as "the Convention") divides ocean space into areas within national jurisdiction and areas beyond national jurisdiction, the latter including the high seas and the Area. Section 2 of Part VII of the Convention provides for the conservation and management of the living resources of the high seas, but it is clear from the contents of Articles 116, 119 and 120 of the same section that the "living resources" in this section mainly refer to fishery resources and marine mammals. Whether or not MGRs are included is a matter of treaty interpretation that whether the term "living resources" in this section can be interpreted in an expansive manner. Part XI is devoted to regulating the legal status and activities in the Area, clarifying that "resources" in the Area means the seabed and the subsoil thereof in the Area. The term "resources" in the Area is defined as all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules, and MGRs are excluded from the definition. Accordingly, marine genetic resources are not provided for in the Convention.

Article 2 of the 1992 Convention on Biological Diversity (CBD), which for the first time defined "genetic resources" as genetic material of actual or potential value, was important in establishing the definition of MGRs. However, the application of the CBD is limited to areas within national jurisdiction, and in March 2003, the Secretariat of the CBD, in collaboration with the United Nations Division of the Law of the Sea (UNCLOS), reviewed the provisions of the CBD and UNCLOS relating to the conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction, and concluded that the provisions of the two Conventions on the conservation and sustainable use of marine biodiversity are complementary. Accordingly, the CBD definition of MGRs could be complementary to UNCLOS similarly, and the access and benefit-sharing regime for genetic resources created in the CBD could be useful in the establishment of access and benefit-sharing regime in the future.

1.1.2 Uncertainty About the Scope of Marine Genetic Resources

What is the most important is that the BBNJ international agreement should stipulate that the geographic scope of application of marine genetic resources is the ABNJ, and Chinese scholars have proposed that the BBNJ international agreement should not affect the rights enjoyed by States in accordance with the Convention in respect of all areas under their national jurisdiction, including the exclusive economic zone and the continental shelf, or their rights in the ABNJ in accordance with the Convention.

With regard to the material scope, some States were of the view that marine genetic resources should not include fish as commodities, which should not be included in the scope of adjustment of the BBNJ International Agreement but should continue to be regulated by the 1995 Fish Stocks Agreement and relevant regional fisheries agreements. BBNJ International Agreement provides for marine genetic resources and should not apply to derivatives. Derivatives are biochemical synthesis products that do not contain functional units of heredity, therefore, they are not genetic resources.

States have not been consistent in their assertions as to whether fish and derivatives are "marine genetic resources". During the BBNJ negotiations, several delegations suggested distinguishing between fish used for research and development purposes as genetic resources and fish used as commodities, moreover, Fiji called for the inclusion of geographical considerations. CARICOM called for the definition of MGRs to include fish used for their genetic characterization.

Japan and China argued for the exclusion of fish used as commodities, a view opposed by Indonesia. The Russian Maritime and Atmospheric Administration (RMAA) warned against jeopardizing existing agreements, arguing that MGRs exclude fish and marine mammals. The World Wide Fund for Nature

(WWF) recommended that fish be included as an important component of biodiversity and all research, including fisheries research. The International Union for Conservation of Nature (IUCN) noted that fish are sometimes harvested as commodities but then used for research purposes. The Food and Agriculture Organization of the United Nations noted the distinction between commodities and genetic resources in the International Treaty on Plant Genetic Resources for Food and Agriculture and the FAO Commission on Genetic Resources for Food and Agriculture.

In addition, according to the Decision No. 391 of the Commission of the Andean Community[1], the Food and Agriculture Organization of the United Nations (FAO), the European Union (EU), the United States and other international organizations and countries have referred to the definition of genetic resources in relevant treaties, with slight differences in scope and expression, which demonstrates that the international community has not yet reached a consensus on the definition of genetic resources. On the one hand, it is due to the limitations of the level of technology and the cognitive ability of human beings, and on the other hand, due to the complexity of the attributes of MGRs themselves as "things". The lack of uniformity in the definition and scope of MGRs may lead to legal uncertainty and hinder the implementation of the treaty, but at the same time, maintaining the diversity and plasticity of the concept is conducive to the treaty's response to the changes brought about by technological updates in the access and benefit-sharing of MGRs, in particular when new ways of utilizing MGRs have emerged. Some scholars are of the view that the definition and scope of MGRs in the BBNJ international agreement can be appropriately maintained with a certain degree of elasticity, so as not to cause too many disagreements and interest entanglements among countries.

1.2 Uncertainty About the Legal Status of Marine Genetic Resources

Clarification of the legal status is a prerequisite for the conservation and sustainable utilization of marine genetic resources, and will also directly affect the pattern of benefit-sharing between States in the ABNJ. Therefore, the game between developed and developing countries on the issue of access to MGRs and benefit-sharing depends to a large extent on the determination of the legal status of MGRs.

As mentioned earlier, among the two most important international treaties on marine life in the international community, we can't find the basis for the protection and sustainable utilization of MGRs in the ABNJ. Through negotiations between countries, according to the basic principles of treaty interpretation under international law, three distinct camps were formed based on the interpretation of the existing international legal framework: the ocean exploitation camp, the benefit-sharing camp, and the harmonization and pragmatism camp, each of which has seemingly reasonable claims and theoretical bases. In fact, all three camps take the legal framework of the Convention as their starting point.

1.2.1 Perspectives and Theoretical Foundations of the Ocean Exploitation Camp

The ocean exploitation camp, represented by developed countries such as the United States and Japan that have absolute advantages in terms of funds and technology for the development of marine resources, insists on "first-come, first-served" and "freedom of the high seas". This camp of thought holds that the MGRs of ABNJ are mainly distributed in the water column and seabed, and that the resources in the international seabed area that belong to the "common heritage of mankind" as stipulated in Part 11 of the UNCLOS refer to mineral resources, so the other biological resources in the water column and the seabed should be distributed in accordance with the default mode based on the principle of "freedom of the high seas". The principle of "freedom of the high seas" should be used to regulate the exploitation of marine genetic resources, and these countries are therefore free to exploit marine genetic resources on the premise of fulfilling their obligations on the high seas under UNCLOS, and this is one of the freedoms not exhaustively enumerated in the principle of "freedom of the high seas". Moreover, the existing norms of international law are already sufficient to deal with the BBNJ issue, and there is no need to establish new norms or institutions. The extensive discussions on the attribution of rights to marine genetic resources which has been enthusiastically promoted by the international community, has, on the contrary, constrained the incentives of countries to exploit the sea. This is in line with the self-interest of developed countries, which have strong

economic power and advanced science and technology, and the application of the principle of "freedom of the high seas" to MGRs will not constitute a substantial obstacle to their monopolistic exploitation.

1.2.2 School's Perspectives and Theoretical Basis of the Benefit-Sharing Camp

The "common heritage of mankind camp", also known as the benefit-sharing camp, represented by developing and underdeveloped countries such as China and the G77 countries, considers MGRs to be the "common heritage of mankind", and hopes that a relevant system can be formulated through negotiation to regulate the unrestricted exploitation and utilization of marine genetic resources by developed countries such as the United States and Japan on the basis of their economic strength and technological advantages.

This idea is intended to enable mankind to share the resources of this common area, and to make a reasonable distribution of benefits between developed countries with technology and capital, and developing and backward countries that do not have the capacity to develop these resources.[2]

The African Group called for a frank and constructive dialogue on the principle of inheritance of the common heritage of mankind in future negotiations; In subsequent negotiations, China put forward a further view that the principles applicable to access and utilization of marine genetic resources should be regulated separately, arguing that research on and utilization of the resources was a matter for the benefit of mankind, and it would be more appropriate to regulate them as "common property", whereas access to the resources would be more free, as it would have only a negligible impact on the marine ecosystem; Brazil considered that both access and utilization of marine genetic resources should be carried out in a fair and equitable manner; Argentina questioned the current situation of unrestricted access to marine genetic resources by a few developed countries, which was unacceptable to developing countries. Negotiations should consider incorporating the principle of inheritance of the common heritage of mankind into the regime for the exploration of and access to marine genetic resources, leading to the establishment of a fair and transparent benefit-sharing mechanism.

The "benefit-sharing camp" has rationalized the principle of common heritage of mankind in the Area to cover MGRs existing in the Area and to bring them under the jurisdiction of the International Seabed Authority (ISA), which is conducive to the protection of the marine environment and the avoidance of the "tragedy of the commons". However, the power of discourse and negotiation requires the backing of technical and financial strength, and it is obvious that the benefit-sharing camp does not have the advantage in terms of technical and financial strength, so the power it can play is very limited.

Of course, there are still countries who advocate that the determination of the legal status of the MGRs of ABNJ should be differentiated according to the geographic location of the MGRs, and the principle of "freedom of the high seas" should be applied to the high seas, while the principle of "common heritage of mankind" should be applied to the international seabed area. The principle of "freedom of the high seas" should be applied to the high seas and the principle of "common heritage of mankind" to the international seabed area.

1.2.3 A Coordinated and Pragmatic Third Way for Marine Environmentalists

Apart from the two opposing camps of "ocean exploitation" and "benefit-sharing", on the issue of the legal attributes of MGRs, the ocean environmentalists represented by the European Union have proposed a "coordinated and pragmatic" solution. On the issue of the legal attributes of MGRs, the European Union, as the representative of the marine environmentalists, has proposed a "coordinated and pragmatic" solution to build a comprehensive, pragmatic, sustainable, equitable and cost-effective system; Bangladesh has even pointed out right on the spot that neither the principle of the common heritage of mankind nor the principle of the freedom of the high seas applies to marine genetic resources, and that a hybrid approach should be adopted to resolve this contentious issue. However, the specific "hybrid" approach has not been discussed further. In fact, this "harmonized and pragmatic" hybrid approach directly bypasses the views of the two camps that have been the subject of the most intense discussions, and instead discusses the design of a specific regime. At present, the discussion on the topic of marine genetic resources is mostly divided, and the prospect of future negotiations

is not clear, but we cannot rule out the possibility of harmonizing and compromising the interests of all parties.

In conclusion, the definition and legal status of marine genetic resources beyond the limits of national jurisdiction is a prerequisite for their conservation and sustainable utilization, and there is a wide divergence of views between developed and developing countries on this issue.

At present, the draft amendments issued by the United Nations have already reached a basic consensus, establishing the basic objectives and broad provisions for the regulation of marine genetic resources, although the provisions of the draft articles are relatively principled, and the possibility of reaching a consensus on this issue in the future negotiations remains extremely low. However, a clear definition of marine genetic resources and a multi-dimensional definition of the legal status of marine genetic resources in terms of their properties, while taking into account the equity and efficiency of the conservation and sustainable utilization of marine genetic resources, will ultimately improve the benefit-sharing mechanism from a fair and reasonable perspective.

2. Analysis of the Causes of the Negotiation Dilemma on Benefit-Sharing of MGRs

2.1 Conceptual Gaps in the Existing Body of International Law on MGRs

As mentioned earlier, MGRs are vaguely defined in the existing framework of international law. The CBD for the first time addresses and proposes a definition of "genetic" and other related terms, including the definitions of the two basic terms "genetic material" and "genetic resources", "genetic material" meaning any material from plants, animals, microorganisms or other sources containing functional units of heredity, and "genetic resources" meaning genetic material of actual or potential value. In the BBNJ negotiations, it was also argued that reference could be made to the relevant terms in the existing norms to define the concepts in the issue of marine genetic resources, but the problem is that, in order to balance the interests of all parties and to achieve the entry into force of the treaty, the existing treaties do not have a clear definition of MGRs, and their language has been abridged to the extent that it is not possible for all parties to the negotiation to raise any objections. As a result, it is not possible to find a clearer definition from the existing body of international law to draw upon.

Secondly, in the case of contingent treaties, their application is limited in terms of temporal scope, geographic scope and object of application. With regard to the temporal scope of application of the CBD system, the CBD, the Nagoya Protocol, the Bonn Guidelines and other documents do not include provisions related to the time of application, and the relevant provisions of the conventions do not apply retroactively to biological genetic resources prior to the entry into force of the conventions; geographically, the CBD addresses the components of biodiversity, and applies only to areas within the national jurisdictions of the conventions, while the processes and activities are applicable to areas beyond national jurisdictions, and the Nagoya Protocol applies to areas beyond national jurisdictions. In terms of geographical scope, the CBD addresses the components of biological diversity and applies only to areas within national jurisdiction as defined in the Convention, while processes and activities apply beyond areas of national jurisdiction, whereas the Nagoya Protocol is limited to areas within national jurisdiction as defined in the Convention; in terms of target audience, the CBD includes any material of plant, animal, microbial or other origin that contains functional units of heredity, whereas the Nagoya Protocol excludes genetically functioning derivatives on that basis.

2.2 Difficulty of the Draft Text in Meeting the Governance Needs of MGRs

One of the overall objectives of the draft international agreement on BBNJ is to ensure the conservation and sustainable use of marine biodiversity beyond national jurisdiction through the effective implementation of the relevant provisions of the United Nations Convention on the Law of the Sea and the promotion of a deeper level of international cooperation and coordination. However, the content of the objectives written in the section of the draft on the governance of marine genetic resources is slightly narrower than the overall objectives, focusing mainly on the description of issues such as access, benefit-sharing and transfer of technology of MGRs as a means of realizing the governance of MGRs. This is obviously unable to guarantee the sustainable conservation and comprehensive utilization of marine biodiversity. In addition, the draft

international agreement on the BBNJ does not explain the relationship between benefit-sharing of marine genetic resources beyond the limits of national sovereignty and benefit-sharing of biogenetic resources within national jurisdiction.

In terms of modalities for benefit-sharing, the text of the BBNJ draft international agreement adopts a "one-size-fits-all" approach to benefit-sharing of marine genetic resources, proposing to explore a dichotomous model of benefit-sharing of marine genetic resources modeled on the regime and concepts under the CBD system and the triggering of the benefit-sharing obligation depends on the act of access to or use of MGRs, but delegates have not yet reached agreement on this proposition. Indeed, the dichotomous model of monetary versus non-monetary benefits reflects the different interests of individual States in the negotiations.

The negotiations have also addressed the question of whether intellectual property rights should be included in the benefit-sharing framework for MGRs. References in the negotiations to the applicability of the intellectual property rights regime and obligations such as disclosure of origin of resources, including the draft, explicitly exclude the collection/utilization/access of marine genetic resources from patent protection. In this regard, however, scholars have also questioned why intellectual property rights should be included in the discussion of a voluntary benefit-sharing regime for MGRs if they are to be excluded as a private right.

Drawing on historical negotiation processes and experiences, the underlying reason for the difficulty in reaching a harmonized international agreement on BBNJ is the divergence of interests, which has manifested itself in divergent positions in the negotiations, and which ultimately will continue to be the product of a compromise of interests.

3. Breakthroughs in the Legal Dilemma of MGRs in the ABNJ from a Practical Perspective

Taking into account the fact that the legal aspects of MGRs beyond national jurisdiction are highly controversial among States and that the formulation of new international treaties or international legal rules will go through a lengthy negotiation process, it is therefore recommended that short-term management measures be adopted in order to better promote the conservation and sustainable use of marine biological genetic resources in the current environment.

Specifically, short-term management measures include General Assembly resolutions, voluntary codes of conduct formulated by scientific researchers, international cooperation among States, and the establishment of marine protected areas, with active negotiation, active compliance and voluntary implementation by States as the main modalities. First of all, General Assembly resolutions have a substantive impact on the development of international law because they express matters of common concern and the general will of the international community, convey a negotiating mandate that can serve as a preparation for the formulation of a treaty by the General Assembly or a diplomatic conference, and even serve as a basis for the formation of customary international law. However, these short-term management measures are not binding, and their effective implementation depends on the consciousness of the international community. However, in the current environment, these short-term management measures can protect the marine environment to a certain extent.

China, as a major maritime country, should consider and present its position on the legal issues applicable to the BBNJ area. The ecosystem approach, as one of the important approaches to marine ecosystem governance, and the interconnectedness of marine biodiversity requires coordination and cooperation within the entire ecosystem, and it is more conducive to the achievement of marine ecosystem environmental protection through the promotion of the coordination of treaties and institutions and organizations, and the ecosystem approach is indispensable to the discussion of the BBNJ issues as well as to the global marine ecosystem governance. The ecosystem approach is indispensable in both the BBNJ discussions and the global marine ecosystem governance. The "community of marine destiny" is a concept of marine ecological and environmental governance with Chinese characteristics, and it is the first time that the concept of community is introduced in the field of marine affairs, which has largely enriched the connotation of the new governance concept of "community of human destiny".

At the same time, it is also a concept for the

global ocean area, which includes three levels: bilateral cooperation among countries, regional cooperation and global cooperation. China has actively participated in the negotiation of the BBNJ international instrument and has submitted written comments on two occasions, which is also an important part of the global ocean cooperation in the new era. Combining the ecosystem approach with the concept of a "community of destiny for the oceans" is an important initiative for China's participation in global marine ecological and environmental governance, which can increase China's voice in the BBNJ negotiations and is conducive to the development and strengthening of China's cooperation in global ocean affairs.

4. Conclusion

The study reveals a lack of specific rules governing biological genetic resources in areas beyond national jurisdiction, but UNCLOS is still seen as the main international law basis for the protection and management of MGRs in the ABNJ. The Convention needs an enlarged and imaginative interpretation of the provisions relating to the protection and preservation of the marine environment, living marine resources, the Area and the high seas in order to provide a comprehensive and systematic legal basis for the protection of biological resources and the marine environment beyond areas of national jurisdiction, and to adapt to the new and increased modes of use in these areas.

The international community should speed up the negotiation process and resolve the issue of the management of biological genetic resources as soon as possible. States should first reach an international consensus on the effective protection, rational utilization and equitable sharing of marine genetic resources beyond the limits of national jurisdiction, on the basis of which short-term management measures should be implemented on a temporary basis to prevent excessive deterioration of the environment of biological resources. At the same time, a new international law management framework should be created to fundamentally fill the legal loopholes and eventually establish a sound and reasonable benefit-sharing mechanism.

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