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Item 5.2 of the provisional agenda*

MARINE AND COASTAL BIODIVERSITY: REVIEW, FURTHER ELABORATION AND REFINEMENT OF THE PROGRAMME OF WORK

*Conservation and sustainable use of deep seabed genetic resources beyond national jurisdiction:
study of the relationship between the Convention on Biological Diversity and the United Nations
Convention on the Law of the Sea*

*Revised note by the Executive Secretary***

1. In paragraph 12 of decision II/10, the Conference of Parties to the Convention on Biological Diversity requested the Executive Secretary, in consultation with the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations (UNDOALOS), to undertake a study of the relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed, with a view to enabling the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to address at future meetings the scientific, technical, and technological issues relating to bioprospecting of genetic resources on the deep seabed. In parallel, the United Nations Secretary-General in his report to the United Nations General Assembly at its fifty-first session underlined the need for the rational and orderly development of activities relating to the utilization of genetic resources derived from the deep seabed area beyond the limits of national jurisdiction.

2. In accordance with that request, the Executive Secretary and UNDOALOS have prepared a study on the issue, which is available as an information document (UNEP/CBD/SBSTTA/8/INF/3/Rev.1) for the current meeting of SBSTTA. The study reviews the provisions of the two conventions as they relate to the conservation and sustainable use of the genetic resources of the deep seabed beyond the limits of national jurisdiction. It notes the complementary nature of the provisions of the two conventions with regard to the conservation and sustainable use of marine and coastal biological diversity. The United

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** The present note replaces and supersedes the note circulated as document UNEP/CBD/SBSTTA/8/9/Add.3 of 25 November 2003.

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Nations Convention on the Law of the Sea applies to all activities in the oceans and seas, including in relation to genetic resources on the deep seabed beyond the limits of national jurisdiction. The Convention on Biological Diversity applies to components of biological diversity in areas within the limits of national jurisdiction of a Party and to all processes and activities carried out under the jurisdiction or control of a Party in areas within or beyond its national jurisdiction. With respect to the marine environment, Parties to the Convention on Biological Diversity are required to implement the Convention consistently with the rights and obligations of States under the law of the sea.

3. Although the United Nations Convention on the Law of the Sea does not specifically address marine genetic resources, it includes provisions for the protection of the marine environment in general and marine living resources and other forms of marine life in particular. Furthermore, States are required to protect rare and fragile ecosystems. The United Nations Convention on the Law of the Sea also contains rules for the exploration and exploitation of mineral resources on the seabed beyond the limits of national jurisdiction and for marine scientific research.

4. The United Nations Convention on the Law of the Sea establishes a general framework to govern all activities on the oceans. In order to do so, it takes both a spatial and a functional approach. In the first instance, the sea is divided into different zones, largely based upon distance from the coast. The sea is also divided vertically, with the water column being differentiated from the ocean floor or “seabed”. Coastal States enjoy certain rights in the zones under their jurisdiction, up to the point where the water column becomes the high seas, and the seabed becomes “the Area”. The high seas and the Area are beyond the limits of national jurisdiction where no State may exercise sovereignty over ocean space and may exercise jurisdiction only over their nationals and ships flying their flag.

5. In view of the lack of general national jurisdiction, the United Nations Convention on the Law of the Sea establishes specific regimes for living resources in the high seas and mineral resources in the international seabed area. On the high seas, all States enjoy certain very strictly regulated “freedoms”, subject to the interests of other States in their exercise of the same freedoms, as well as their rights with respect to activities in the Area. Indeed, because activities on the high seas are strictly regulated, the “freedoms” only exist in the sense that the high seas are open to all States and subject to the jurisdiction of none. On the high seas, therefore, the conservation of living resources and other forms of marine life, as well as the protection of the marine environment, depend upon the willingness of States to cooperate to develop specific rules, to implement them and to enforce them *vis-à-vis* their nationals. Unfortunately, all too often, due to the lack of internal will and external constraints, States have failed in their duty to conserve natural resources and to protect the environment.

6. In contrast, the Area and its resources are regulated by an elaborate international regime administered by the International Seabed Authority. The mineral resources of the Area are the common heritage of mankind and their exploration and exploitation shall be carried out for the benefit of mankind as a whole. The regime for the management of resources of the Area applies exclusively to mineral resources, and it provides for the protection of the marine environment in the Area. In light of the meaning ascribed to “resources” in part XI of the United Nations Convention on the Law of the Sea, commercially-oriented activities relating to genetic resources of the deep seabed are not envisaged as the subject of the regulatory framework established. The biological resources of the Area were not included in the international regime, because they had just been discovered, almost nothing was known about their nature, their extent or their value. Most people thought that the ocean floor was a vast desert with a light scattering of polymetallic nodules.

7. No State can claim or exercise sovereign rights over the Area and its resources. To fill the jurisdictional gap and to prevent a potentially destructive and inequitable free-for-all grab of mineral

resources, the United Nations Convention on the Law of the Sea established the International Seabed Authority, which regulates those activities and is required to provide for the equitable sharing of financial and other economic benefits derived therefrom. It is significant to note that the Convention imposes a duty on International Seabed Authority to take necessary measures, in respect of activities in the Area, aimed at preventing, reducing and controlling pollution and other hazards to the marine environment, as well as protecting and conserving the natural resources of the Area and preventing damage to the flora and fauna of the marine environment.

8. The Convention on Biological Diversity makes two important distinctions with respect to its jurisdictional application: on the one hand, between “components of biological diversity” and “activities and processes” and, on the other, between areas within and those beyond the limits of national jurisdiction. In areas within national jurisdiction, the provisions of the Convention on Biological Diversity apply to components of biological diversity and to processes and activities that may have adverse impacts on biological diversity. In areas beyond the limits of national jurisdiction, the provisions of the Convention only apply to activities and processes carried out under a Party’s jurisdiction or control which may have adverse impact on biological diversity. Because they have no sovereignty or jurisdiction over the resources, Parties have no direct obligation with regard to the conservation and sustainable use of specific components of biological diversity in areas beyond the limits of national jurisdiction. The Convention on Biological Diversity, consequently, underlines the need for cooperation amongst Parties “in respect of areas beyond national jurisdiction...for the conservation and sustainable use of biological diversity”.

9. The study notes, however, that whereas the provisions of the two conventions are complementary and mutually supportive regarding the conservation and sustainable use of marine and coastal biodiversity, an important legal lacuna exists with respect to commercially oriented activities relating to marine genetic resources in the Area. This lacuna will need to be addressed by the international community given the increasing importance of the genetic resources in these areas and the threat posed to them by various activities that may be carried out without due regard to conservation and equity imperatives. The two conventions contain useful principles, concepts, measures and mechanisms that could provide the building blocks for a specific legal regime for marine genetic resources in the deep seabed beyond the limits of national jurisdiction. The common-heritage-of-mankind principle under the United Nations Convention on the Law of the Sea could provide an important underlying conceptual construct for genetic resources of the deep seabed. In addition, the two conventions share certain principles and concepts, such as the responsibility of States for activities under their jurisdiction and control; the ecosystem approach; the establishment of marine protected areas; information exchange, consultation and notification regarding activities; environmental impact assessment; sustainable use; and fair and equitable sharing of benefits. These principles would provide useful tools in addressing conservation and equity considerations in the management of genetic resources of the deep seabed beyond national jurisdiction.

10. The study concludes by proposing options regarding the management of genetic resources of the deep seabed beyond the limits of national jurisdiction. These options are:

- (a) Maintaining the status quo;

(b) Using the regime of the Area and its resources as a framework for the development of a management regime for the genetic resources of the deep seabed; ^{1/} and

(c) Amending the Convention on Biological Diversity in order to extend its application to components of biological diversity in areas beyond the limits of national jurisdiction.

SUGGESTED RECOMMENDATIONS

The Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) may wish to further review the issues raised in this study and recommend to the Conference of the Parties at its seventh meeting to:

(a) Request the Executive Secretary, in collaboration with relevant international organizations, such as the United Nations Division for Ocean Affairs and the Law of the Sea, the United Nations Environment Programme, and the International Seabed Authority, to examine ways and means to identify, assess and monitor genetic resources of the deep seabed in areas beyond the limits of national jurisdiction, including identification of threats to such genetic resources and the means for their protection, and to report on progress thereon to the Conference of the Parties at its eighth meeting;

(b) Invite the United Nations General Assembly to call upon relevant international organizations such as the United Nations Environment Programme, the International Maritime Organization, the International Seabed Authority, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization, the International Hydrographic Organization, the World Meteorological Organization, the Secretariat of the Convention on Biological Diversity, and the United Nations Division for Ocean Affairs and the Law of the Sea, to review issues relating to the conservation and sustainable use of genetic resources of the deep seabed beyond the limits of national jurisdiction and make appropriate recommendations to the General Assembly regarding appropriate actions;

(c) Invite Parties and other States to identify activities and processes under their jurisdiction or control which may have significant adverse impact on deep seabed ecosystems and species beyond the limits of national jurisdiction and to take appropriate actions to minimize such impacts;

(d) Invite Parties and other States to cooperate within the framework of the International Seabed Authority with respect to measures necessary for the conservation and sustainable use of genetic resources of the deep seabed beyond the limits of national jurisdiction.

^{1/} This regime could incorporate the conservation, sustainable use and benefit-sharing principles and tools contained in the Convention on Biological Diversity.