

Legal Status of Marine Genetic Resources in the Context of BBNJ Negotiations: Diverse Legal Regimes and Related Problems

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All views expressed are Author's only and do not necessarily represent the official position of the Government of Poland

Outline

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1. Overview of legal issues
2. CHM principle and the High Seas freedoms

3. Conclusions

1. Introductory remarks

Context of BBNJ Negotiations

Diverse Legal Regimes

„...in the context of BBNJ negotiations...”

BBNJ WG

- 2006-2015 (9 meetings) of the BBNJ WG (Marine Biological Diversity in Areas Beyond National Jurisd.)
- „**2011 Package**” agreed
- 2012: Rio+20 Conference/decision on future treaty before Sept. 2015

UNGA Res. 69/292 (2015)

- On the basis of final BBNJ Recommendations
- „(...) *to develop an international legally binding instrument under UNCLOS*”
- „*on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*”

PrepCom

- 2 x 2 sessions in 2016 (28 March-8 April + 26 August-9 September)
- 2 x 2 sessions in 2017 (27 March-7 April + 10-21 July)
 - „*substantive recommendations to the General Assembly on the elements of a draft text*”
- **21.7.2017: Report of the PrepCom adopted**

UNGA Res. 72/249 (2017)

- decision **on convening and the starting date** of the Intergovernmental Conference
- Organizational session (16-18 April 2018)
- „**initially**” **4 sessions** (2018: September 4-17), 2 x 2019, 1 x first half of 2020

Marine genetic resources (MGRs), incl. questions on the sharing of benefits

Area-based management tools (ABMTs), incl. marine protected areas (MPAs)

+ **Cross-cutting issues**

2011 Package
„...together and as a whole...”

+ **final PrepCom report of 2017 structure**

Environmental impact assessments (EIAs)

Capacity building and the transfer of marine technology

GRs issues (formally) outside BBNJ negotiations

BBNJ

„...to elaborate the text of an international legally binding instrument under” UNCLOS

CBD

CBD COP „Marine and coastal biodiversity” decisions

2010 Nagoya Protocol

Info. Exchange and reporting: **Art. 10 (global multilateral benefit sharing mechanism)** (2016)

WG on **digital sequence information** on genetic resources (2016)

GRs

WIPO

Intergovernmental Committee on Intellectual Property and **Genetic Resources**, Traditional Knowledge and Folklore (2001-)

FAO

2001 International Treaty on **Plant Genetic Resources** for Food and Agriculture

MGRs, definitions (art. 2 CBD)

Biological diversity

- *'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'*

Genetic material

- 'any material of **plant, animal, microbial** or other origin containing **functional units of heredity**'

Genetic resources

- 'genetic material **of actual or potential value**'
- *any material of plant, animal, microbial or other origin containing functional units of heredity **of actual or potential value***

Marine genetic resources

- any material of marine plant, animal, microbial or other marine origin containing functional units of heredity of actual or potential value

2. Legal Status of MGRs

Overview of legal issues

Accessing MGRs (*in situ*)

- **Scope**
 - Geographical: Area or Area + High Seas
 - Material:
 - incl. derivatives?
 - Relationship to fisheries?
- **MSR vs. bioprospecting**
- ***In situ/ex situ/in silico* (digital sequenced data, information)**

Legal status of MGRs *in situ*

- **CHM vs. High Seas freedoms controversy**
- **Other provisions of UNCLOS applicable**
 - Part XII (Marine Environment)
 - Part XIII (MSR)
 - Part XIV (TMT)

Benefit-sharing, subsequent uses

- **Types and modalities of BS**
 - Monetary/non-monetary
 - Clearing-house mechanism
- **Monitoring of utilization**
 - Traceability
- **Compliance**

definitions

MGRs, definitions: selected issues

- Area/High Seas MGRs
- Excluding fish(eries)
 - Fish used as genetic resource / as a commodity
- Utilization of MGRs and derivatives
- *Ex situ/in silico* MGRs

3. Legal status of MGRs

Between the Scylla of High Seas and Charybdis of CHM principle

Overview

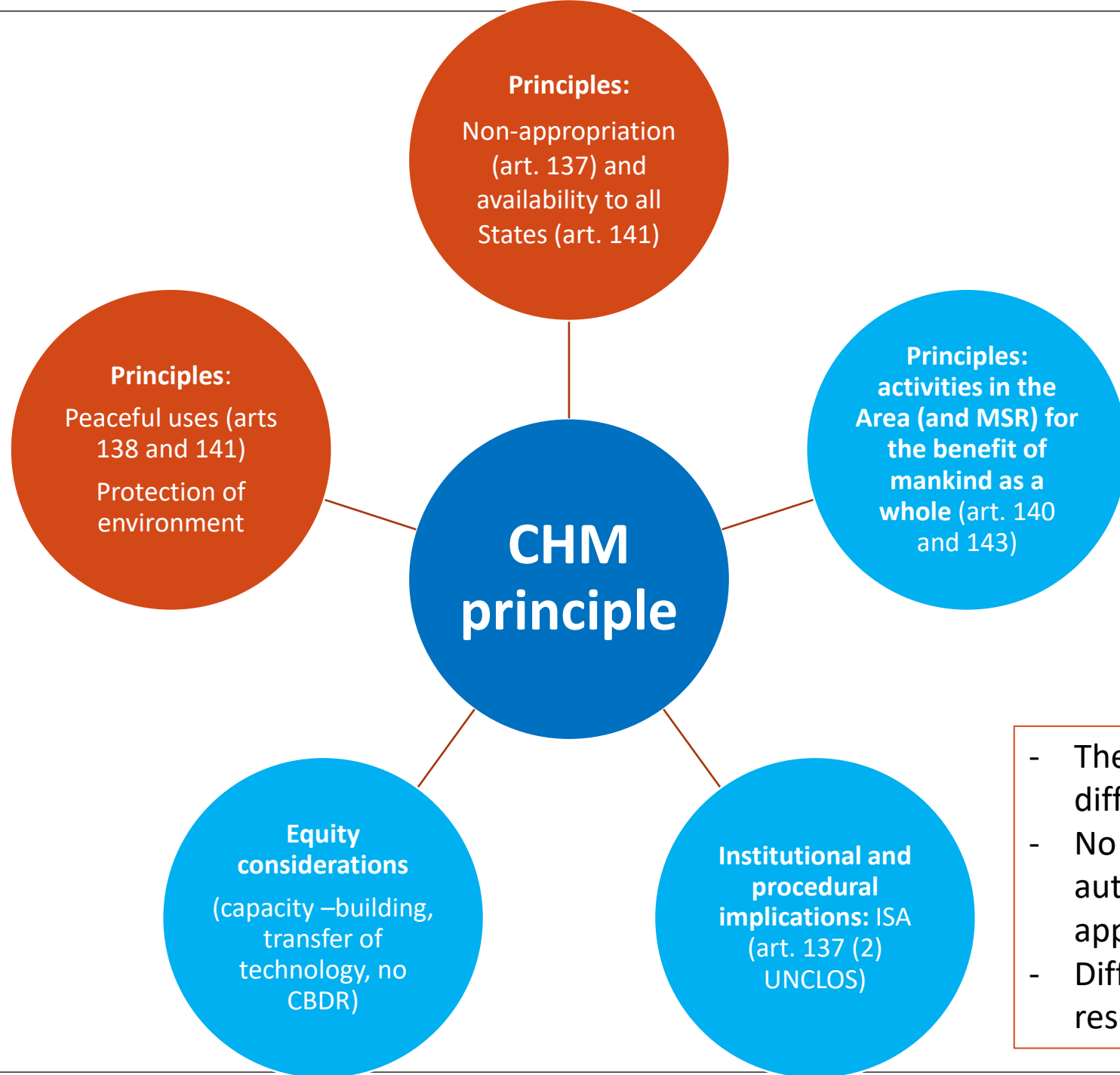
• High Seas

- „negative definition” in art. 86 UNCLOS
 - the Area not excluded from its scope of application
- Art. 87(1): ...freedom of the HS comprises...
- Art. 87(2): freedom is not absolute

- Free access to MGRs
- Due regard standard
- Subject to MSR regime and environmental provisions
- No clear obligations (or restrictions) on subsequent use of MGRs

• The Area

- Art. 136: „the Area and its resources are the” CHM
- Rights to resources vested in mankind as a whole on whose behalf the ISA acts (art. 137(2) UNCLOS) + ISA competences (art. 157)
- Art. 133(a) „“resources” means all solid, liquid or gaseous mineral resources in situ in the Area (...)”
- Art. 1(1)(3): „“activities in the Area” means all activities of exploration for, and exploitation of, the resources of the Area”



- There is a difference
- No automatic application
- Different resources

VCLT methodology

- **The literal interpretation (ordinary meaning)**

- „The Area and its resources” argument

- **Contextual/systematic (context: preamble, text, annexes)**

- Preamble: *develop* the principles embodied in UNGA 2749 (1970)
- Preamble: equitable and efficient utilization of resources, their study and conservation

Object and
purpose
(functional)

- Some UNCLOS (Part XI) provisions refer to „the Area” only (e.g. 138, 141), some to „resources” only (137(2)), and some to both of these terms

- **MGRs in the Area – selected Part XI provisions would apply:**

- Arts 137(1), 138, 141, 143(1) and (3), and art. 256 (MSR in the Area)
- Additionally: arts 145 and 147

CHM principle „unfinished” or uneven in its treatment of resources?

- **Which would not apply?**

- Art. 137(2) – rights in the „*resources of the Area*” are vested in mankind as a whole – ISA acts
- Art. 157(1) – ISA is the organization through which States organize and control „*activities in the Area*”
- Art. 139 – States’ responsibilities with regard to „*activities in the Area*”
- Art. 140 – „*Activities in the Area*” shall be carried out for the benefit of mankind as a whole and the Authority shall provide for the equitable sharing of financial and other economic benefits derived from „*activities in the Area*”
- Art. 144 (transfer of technology), art. 146 (protection of human life), art. 148 (participation of developing States in activities in the Area), arts 273-274 (transfer of marine technology, Part XIV)

VCLT methodology, cont.

- **Subsequent agreement**
 - 1994 Part XI Agreement
- **Subsequent practice in the application of the treaty**
- **Supplementary means** (if the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable)
 - *Travaux préparatoires*
 - ISNT (1975) – RSNT (1976)

4. Conclusions

1. Various fora where questions concerning GRs (not necessarily marine ones) are debated
2. Legal status of MGRs (*in situ*) often primarily understood through the prism of the CHM vs. the freedom of the HS debate
 1. Arguments to substantiate both sides of the spectrum
 2. No „automatic“ application of the CHM principle (as enshrined in UNCLOS) to MGRs
 3. Zonal approach: MGRs in the High Seas?
3. Different legal issues with *ex situ* and *in silico* MGRs
4. Focus on effective solutions to be achieved:
 1. Access issues
 2. Subsequent use
 3. Benefit sharing
5. „Pardian moment“/deepest of ironies

**Accessing
MGRs (*in
situ*)**

**Legal status
of MGRs *in
situ***

**Benefit-sharing,
subsequent uses**

Thank you for you attention

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4. Legal status of MGRs

Definitions

Legal status of MGRs

Access

2017 PrepCom Report:

„The text would address access”

„The text would set out the geographical and material scope of application of this section of the instrument.”

Where you access: in situ, ex situ, in silico

- ***In situ***

- In the High Seas
- In the Area

ITPGFA

Pandemic Influenza
Preparedness (PIP)
framework

- ***Ex situ***

- Collections, gene-banks
 - Pandemic Infu

- ***„in silico”***

- Digital sequenced information (DSI)/data
- Public databases (governmental, academic)
 - International Nucleotide Sequence Database Collaboration (INSDC), incl.: European Nucleotide Archive (Cambridge), GeneBank (USA) or DNA Data Bank (Japan)
- COP CBD decision XIII/16 (2016)
 - Ad hoc Technical WG on DSI meeting (2018) + fact-finding report (2018) + synthesis of views (2018)

Research based on
repositories; „new”
DSI from physical
samples

How you access: MSR vs. bioprospecting

• MSR

- Not defined but: Part XIII UNCLOS, esp.:
 - Arts 238-244 („General Provisions“)
 - Arts 242-244 („International Cooperation“)
 - Art. 257: MSR in the water column
 - Art. 256: MSR in the Area – art. 143 (MSR in Part XI)
 - „...for the benefit of mankind as a whole...“
 - „...effectively disseminate the results of research and analysis...“ (cf. 244)

Scope: ABNJ two distinct maritime zones

„Pure“/fundamental vs. applied MSR

Patenting, IP rights

• Bioprospecting

- Not defined
- „...search for valuable compounds...“, „...with a view to developing...“
- Developments within CBD/Nagoya Protocol

Temporal aspects

