Perspective of South Africa and the African Group in the context of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

South Africa and the African Group Perspective

With respect to marine genetic resources, South Africa and the African Group is of the view that the common heritage of humankind regime applies. Although, as provided for in Art 133, the specific regime in Part XI does not apply to marine genetic resources, the basic principle of the common heritage of mankind applies to MGRs. There is thus a legal gap in the Convention with respect to the application of the common heritage of mankind to marine genetic resources. This gap can only be filled through an implementing agreement which, in some way, gives recognition of the applicability of the principle to MGRs.

South Africa and the African Group Perspective

With respect to conservation and management measures, while the Convention provides a general duty to preserve and conserve the marine environment, it does not provide the details about how this is to be done beyond self-regulation or agreement by states. For example, while marine protected areas are clearly envisioned by the Convention, though not explicitly provided for, they cannot be effectively established and implemented due to the unfettered notion of the freedom of the high seas. Coupled with the lack of globally accepted criteria, standards and processes for the establishment of marine protected areas, the freedom of the high seas has as a result makes the establishment of globally acceptable and respected marine protected areas impossible. Similarly, while the Convention provides for environmental impact assessments, there is no governance system to ensure the application of the impact assessment requirements. There is therefore a need for an implementing agreement to give effect to the basic principles of the convention.

Statement of the Issues

Perhaps no other aspect of the law of the sea has been as contentious as the conservation and sustainable use of marine biodiversity, in particular marine genetic resources, in areas beyond national jurisdiction. While the 1982 UN Convention on the Law of the Sea (hereinafter the "Convention") regulates all aspects of oceans governance, the content of the rules established by the Convention in relation to the conservation and sustainable use of marine biological diversity remain contested. The nature of the legal contestation with respect to the marine genetic resources question concerns not only what the law should be, but also what the law is.

Legal Regime Applicable to Marine Genetic Resources

The contestation over which legal regime applies to marine genetic resources arises mainly from an ambiguity in the Law of the Sea Convention. The deep seabed beyond national jurisdiction, referred to as the "Area" in the Convention, is governed by Part XI of the Convention which establishes the deep seabed as the common heritage of mankind. In a nutshell Part XI establishes a regime, complete with an international organisation, the International Seabed Authority, to ensure that the benefits from the exploitation of the resources on the deep seabed are shared by all humanity. Article 133 unambiguously provides that for "the purposes" of Part XI, the word "resources" means "all solid, liquid or gaseous minerals.

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resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules." This definition is clear and unambiguous and its application would imply that the regime established by Part XI was not applicable to marine genetic resources which, by definition, are biological and can therefore not be said to be "solid, liquid or gaseous mineral resources". However, this conclusion is complicated by the presence of another, equally clear and unambiguous provision of the Convention, namely Article 136 which provides that the "Area *and* its resources are the common heritage of mankind".

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In the face of this ambiguity, different groups of States have proposed different narratives on the law applicable to marine genetic resources on the deep seabed. On the one side of the divide, there is a group of States in whose view marine genetic resources on the deep seabed are governed by Part VII of the Convention. While Part XI promotes the idea of the common heritage of mankind and benefit sharing, Part VII is the antithesis of this and promotes freedom of the seas and a "first come, first serve" approach. Another group of States, in particular the Group of 77 and China, argue that marine genetic resources are governed by the common heritage of mankind principle. The Group of 77 and China also argue, inter alia, that the CHM

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principle applies to the Area since, under Article 136 of the convention it is not only the ‘resources’ of the Area, but also the Area itself that is subject to the CHM. The narrow definition of resources in Article 133(a), for purposes of Part XI, does not affect the applicability of the legal regime in the Convention which provides that the ‘Area and its resources are the CHM. The argument of the Group of 77 and China is also based on a Resolution of the General Assembly of the United Nations that was adopted in 1970, three years before negotiations on the Convention started in 1973 and more than a decade before the Convention was adopted in 1982 and more than two decades before the Convention entered into force in 1994, according to

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which (the 1970 Resolution) “the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole”. Those States that adopt the approach that Part VII, and not Part XI, applies to marine genetic resources on the deep seabed point, first and foremost, to the definition of resources in Article 133 which, on its face, excludes marine genetic resources. Additionally, even Article 140, which provides that “[a]ctivities in the Area … shall be for the benefit of mankind” qualifies this statement by “as provided for in this Part”. With respect to resources, by virtue of Article 133, Part XI is limited to mineral resources. If Part XI is not applicable to marine genetic resources on the deep seabed, so the argument goes, then Part VII must be

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applicable. Part VII, which governs the high seas, provides that the high seas are “open to all States”. Under these provisions of Part VII the resources of the high seas are available for exploitation by whoever is able to exploit them.

Compelling though the argument for the freedom of the high seas approach may be, particularly in the light of the clear text of Article 133, the approach does suffer from some flaws. First, Part VII lists a number of activities which are subject to the freedom of the high seas.The exploitation of marine genetic resources is not included in the list.

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The exploitation of marine genetic resources is qualitatively different from fishing such that it could not be subsumed under fishing. While exploitation of fisheries is concerned with the individual fish harvested from the oceans with the possibility for others to exploit whatever remains in the ocean, the exploitation of marine genetic resources is concerned more with the identification of gene sequencing and/or information and not so much the exploitation of the individual resource physically harvested from the ocean. Thus, what is harvested are samples from the sea, from which genetic information is identified and patented with a view to legally precluding later use of similar resources.

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Similarly, while an argument could be made that exploitation of marine genetic resources amounts to scientific research, the freedom to conduct marine research in Article 87(1) is subject to Part XIII of the Convention which in turn suggests that marine scientific search in the deep seabed is subject, not to Part VII, but to Part XI. The most serious flaw of the freedom of the high seas argument, however, is that it ignores the fundamental logic of the Convention, namely that the regulation of various resources in the Convention, and the rights and obligations of States Parties in relation to such resources, is dependent on the maritime zone in which the resource is found and not on the nature of the resource.

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The relevant zones are the territorial waters, the exclusive economic zones, the continental shelf, the high seas and the deep seabed. The high seas – the water column above the deep seabed – are legally, though not biologically, separate and distinct from the deep seabed. Part VII and the rights contained therein apply only to the high seas and not to the deep seabed. It is thus safe to say that the differences of views between States on the legal regime applicable to marine genetic resources of areas beyond national jurisdiction cannot be resolved by reference to the text of the Convention. Moreover, the *trauvaux preparatoire* are unlikely to offer any assistance since, at the time of the negotiation of the Convention, it was assumed that

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the lack of sunlight in the deep seabed made life impossible. As a result the negotiators focused on mineral resources for which the prospects of exploitation seemed more likely. In this respect there was very little discussion of the definition of resources in the course of the negotiations.

What has, thus far, not being considered adequately are the various options for resolving the impasse.

Scope

As the scope of the IA is ABNJ, an IA would apply to MGRs obtained from the high seas and the Area. Having said that, many MGRs are mobile and, at different stages in their life, may be permanently or temporarily attached to rocks or may be free-swimming or floating in the water column or moving between the benthic zone and the pelagic zone. The vertical scope of the Implementing Agreement (IA), therefore, is very important. An IA which only covers sedentary species, for instance, would miss the vast majority of deep sea MGRs. Similarly, the horizontal scope of the IA needs to be addressed.

Sharing of benefits

Benefit sharing is certainly one of the elements of the common heritage of mankind. It represents the intra-generational equity side of the common heritage of mankind coin or, to put it another way, its distributional component within the current generation. Seen in this light, the common heritage of mankind principle reflects the foundational elements of sustainable development, namely inter- and intra-generational equity and the integration of the two. Benefit-sharing should be understood as benefit to mankind as a whole. This itself has a number of implications:

Sharing of benefits

- (i) benefit-sharing should be aimed at the upliftment of those most disadvantaged and marginalised;
- (ii) capacity-building of developing countries should be key for benefit sharing;
- (iii) for monetary benefits, the amounts paid should be sufficient to achieve the objectives of ensuring the solidarity called for common heritage of mankind i.e. inter- and intra-generational equity.

THANK YOU