

Overview of Legal, Regulatory and Implementation Gaps in the Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction

Summary

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This paper is a summary of existing gaps, including legal, regulatory gaps and implementation gaps¹ in the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (ABNJ) following discussions in recent BBNJ meetings, including the April 2014 BBNJ meeting. Where relevant they are supplemented by discussions from the May 2013 BBNJ workshops. The references to the observations are provided in the main paper.²

Overall objective and starting point

The package agreed upon in 2011 is the suggested starting point to address “together and as whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology.”

Overall gaps and objectives identified include the need to:

- Address fragmentation in governance and management of present and future threats to marine biodiversity in ABNJ
- Work within the framework and principles established by UNCLOS
- Develop a benefit-sharing regime for marine genetic resources (MGRs), establish representative marine protected area (MPA) networks, and assess environmental impacts including cumulative impacts
- Take into account modern conservation principles such as ecosystem-based management and the precautionary principle

Marine Genetic Resources, including questions on the sharing of benefits

- Access to MGRs in ABNJ and the sharing of benefits arising from their exploitation
- Access to samples and data and the ability to use MGRs
- Capacity-building and technology transfer critical to scientific development of MGRs
- Baseline information and monitoring of loss of MGRs
- Traceability of the geographical origin of MGRs in patent applications and checkpoints to confirm geographical origin
- Funding mechanisms
- Improved collaboration between countries

Area-based management tools, including marine protected areas (MPAs)

- A global framework for the identification, designation and establishment of marine protected areas in ABNJ and the establishment of a global network of representative marine protected areas, and global criteria
- A global framework for regional cooperation similar to that in place for RFMO/As under the United Nations Fish Stocks Agreement for regional seas organizations. Alternatively, a fully global approach could be considered
- The need to legally bind non-parties
- Transparency

Gaps Analysis: Summary

- *Ecologically or biologically significant marine areas (EBSAs)*
 - Incorporation of EBSAs into sectoral and MPA planning, with an obligation to assess prior impacts and not authorize actions to go forward unless managed to prevent significant adverse impacts (SAIs)
 - Systematic assessments and the sharing of data and expertise across sectors
 - Effective responses by sectoral organizations to information on areas of ecological or biological significance
 - Collaboration between the process to identify EBSAs and the Regular Process
 - Better collaboration between EBSA and VME assessments through the input of science across sectors

Environmental Impact Assessments and Strategic Environmental Assessments

- The obligation under article 206 of UNCLOS to carry out impact assessments needs to be operationalized
- The need for an overarching global framework to conduct environmental impact assessments that would include criteria on the activities and thresholds that would require an EIA
- Standards or guidelines for how to conduct environmental impact assessments
- Strategic environmental assessments to address programmes, plans and policies
- Procedures for reporting, assessment, and monitoring of activities
- The need to address cumulative impacts and the need for cross-sectoral assessments to address conflicting existing uses or activities such as fishing, seabed mining and the laying of submarine cables
- Determination of required follow-up action following environmental impact assessments
- Regulation of the implementation of potential and emerging activities in ABNJ, such as climate engineering, marine tourism, offshore mariculture (aquaculture carried out in seawater), offshore energy production, and underwater noise

Conservation and Management Tools

- The lack of a coordinated management approach in ABNJ, such as potential cumulative adverse impacts on seamounts resulting from cobalt-crust mining combined with bottom trawling
- The lack, in many regions, of an organisation with a mandate for the conservation and sustainable use of marine biodiversity in ABNJ or with regulatory capacity for ocean uses not regulated elsewhere
- The need for cross-sectoral management approaches and better coordination and cooperation among sectoral authorities
- The need to establish the responsibility of States for activities in ABNJ

Marine Science

- The need for further scientific research in ABNJ to fill data gaps and enhance understanding
- The need for a centralized data repository for research results
- The need to increase South-South cooperation, including in relation to MGRs

Technology Transfer and Capacity Building

- Limited implementation of Part XIV of UNCLOS on the development and transfer of marine technology
- Global mechanisms for technology transfer and data sharing, as well as to protect commercially confidential data and address data access

Transparency

- Transparency in oceans governance is required.
- Some recent global initiatives related to oceans, including in relation to ABNJ, need to be more transparent and to take better account of the interests of, and the need for the involvement of, developing countries.

¹ Following BBNJ practice to date, this paper distinguishes from legal or regulatory gaps on the one hand and implementation gaps on the other. This paper interprets a ‘legal or regulatory gap’ to mean an issue which is currently unregulated or insufficiently regulated at a global, regional or subregional level, either in a substantive or geographical sense or both. A legal gap describes the absence of a rule or norm and a ‘regulatory gap’ describes the absence, or failure, of an institution to regulate an issue or matter. The term ‘legal or regulatory gap’ conveniently describes a situation where due to legal or institutional deficiencies, an issue is not adequately addressed. The term ‘governance gap’ is sometimes used as well: This describes a gap in the international institutional framework, such as an absence of an institution or legal mechanism (at a global, regional or sub-regional level). An implementation gap, on the other hand, denotes the failure of an existing institution or an applicable legal mandate or rule to regulate an issue or matter properly, or to reach a desired goal where there are no legal or regulatory barriers or issues preventing implementation.

² DEJ Currie, Overview of Legal, Regulatory and Implementation Gaps in the Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction. At <http://highseasalliance.org>.