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Trends In Commercial Development Of Ocean Resources: New Laws And Policies Present Opportunities And Risks – Part II

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Editor's Note: This is the second of a two-part article on developments in ocean resources. Part I in last month's MCC summarized the near-term changes in off-shore renewable energy and alternative use development that will result from provisions in the Energy Policy Act of 2005. It also addressed the continuing U.S. failure to accede to the UN Convention on the Law of the Sea. Part II in this issue relates to current efforts to address the international law framework governing marine genetic resources in the deep ocean.

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Opportunities And Risks Involving Marine Genetic Resources

Despite the U.S. failure to accede to the UN Convention on the Law of the Sea (UNCLOS), important developments relating to marine genetic resources continue to accelerate at the international level. These changes include recent developments with respect to marine genetic resources. The deep ocean is a major reservoir of global biodiversity, particularly in "hotspots" around seamounts, deepwater corals, methane seeps, and hydrothermal vents. These ecosystems offer significant opportunities for scientific and commercial research. Although marine research is expensive, bio-prospecting for genetic material has increased notably in recent years as deep-water exploration technology becomes more accessible. The pharmaceutical, biotechnology, and cosmetics sectors are all active in

the field.

At the same time, the international community has become increasingly concerned that these ecosystems are vulnerable, primarily from unsustainable fishing practices such as unreported and illegal catches and bottom trawling. Because many of these ecosystems lie in areas beyond national jurisdiction, however, there is no clear international framework governing activities aimed at these resources. The conservation and sustainable use of these resources has therefore attracted growing international attention. In addition, developing countries have taken the position that such resources are "the common heritage of mankind" and that benefits derived from them must be shared accordingly.

The United Nations General Assembly adopted a resolution in 2004 to establish a working group to examine these issues. The

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working group met in February 2006. Although it did not adopt any formal decisions or make significant progress in resolving open issues, the meeting set the stage for further, more focused work, including the possibility of a new binding agreement (as proposed by the EU).

The past year has seen the publication of three major international reports on this subject, focused in large part on the ambiguous legal framework applicable to these resources, and in particular the regime applicable to "bioprospecting" for genetic materials in these areas. That framework currently consists of a patchwork of instruments, none of which directly addresses the treatment of marine biodiversity or bioprospecting for marine genetic resources. These instruments include UNCLOS, the Convention on Biological Diversity, various intellectual property rights agreements and regional fisheries agreements. Each of these agreements is relevant to some degree, but there is no comprehensive mechanism that governs activities directed at marine biodiversity or genetic resources beyond the limits of national jurisdiction.

As the framework agreement governing all issues relating to oceans, UNCLOS is widely recognized as the starting point for evaluating any rules applicable to activities relating to these resources. UNCLOS sets out the rights and obligations of parties on the basis of maritime zones, delineated according to distance from the coastline. States have sovereignty over their territorial seas and sovereign rights over the resources in their Exclusive Economic Zones and continental shelf. The area beyond these limits is known as the high seas and, with respect to the seabed and ocean floor beyond the continental shelf, as "the Area." Living resources in the high seas and in the Area are subject to an open-access regime, and generally not subject to individual national measures to protect the marine environment or resources.

UNCLOS does not, however, specify which regime is applicable to genetic resources located beyond national jurisdiction. A debate has therefore emerged about the status of these resources under the Convention, focused primarily on whether they are analogous to seabed mineral resources, which are declared the "common heritage of mankind," or instead should be treated as living marine resources on the high seas, generally free to be collected and sampled by all. A number of other UNCLOS provisions are also potentially relevant to this debate, including: (a) the regime for deep seabed mining in the Area, which declares

mineral resources the common heritage of mankind and subjects activities in the Area relating to mineral resources to the jurisdiction of the International Seabed Authority (ISA); (b) the regime for marine scientific research, under which states have a right to conduct marine scientific research (MSR); (c) the rules relating to development and transfer of marine technology; and (e) the regime relating to the protection and preservation of the marine environment. But the only clear regime under UNCLOS that currently governs bioprospecting beyond national jurisdiction is flag state jurisdiction. This has raised concerns about whether UNCLOS is appropriately configured to address the conservation, sustainable use, and sharing of benefits derived from marine biodiversity.

A number of other instruments exist that may be relevant to bioprospecting activities, including mechanisms under which countries agree to exercise their jurisdiction to control activities in the high seas to protect the marine environment or set sustainable harvest limits for fish. These include measures to establish so-called "marine protected areas." There are also various codes of conduct under development that would apply to marine scientific research in the deep seabed. Reliance on such voluntary codes is likely to increase in the absence of any clear binding regulatory or management framework. One such approach is being developed by a scientific initiative known as "InterRidge," which would apply to organizations and individuals performing MSR on hydrothermal vents (both within and beyond areas of national jurisdiction). In addition, codes of conduct for access and benefit-sharing that have been developed for land-based bioprospecting may also be relevant.

At the February meeting of the UN working group, it was widely agreed that illegal, unregulated and unreported (so-called "IUU") fishing, together with the destruction wrought on fragile ecosystems on the ocean floor by bottom trawling, poses the greatest immediate threat to these unique marine ecosystems and their associated biodiversity. Many countries, supported vocally by the NGO community, called for near-term action to address what is the most immediate threat to these ecosystems, and urged the UN General Assembly to adopt a resolution calling for a moratorium on unregulated high-seas bottom trawling.

Beyond that consensus, positions vary among developing and developed countries. Developing countries are concerned about the lack of effective regulation of, access to and sharing of benefits arising from genetic

resources, which, as noted, they view as the "common heritage of mankind." These countries advocate the need to consider a new regime to implement benefit-sharing. Developed countries in turn believe that the ISA lacks jurisdiction over marine genetic resources. The United States' formal position is that marine bioprospecting beyond national jurisdiction is a high seas freedom. Some countries have suggested that the legal debate should be sidestepped for the time being in favor of pragmatic approaches to provide more immediate protection of these resources. It seems likely that near-term action with respect to high-seas bioprospecting will be focused on concrete steps such as establishing guidelines or a code of conduct to govern such activities.

Although the potential scope of the EU's proposed new agreement is very vague, it appears that one of the main purposes of the initiative is to impose further controls on IUU fishing activity. The NGO community has been vocal in its demand for a UN resolution calling for an immediate cessation of bottom-trawling fishing, to be followed by a comprehensive new strategy to develop an effective new marine protected area regime. It seems likely that the February UN meeting will galvanize further action toward this end.

New developments in non-binding guidelines relating to marine scientific research and bioprospecting and efforts by developing countries to extend access and benefit-sharing issues to the treatment of high seas genetic resources will primarily affect commercial interests such as the pharmaceutical, cosmetics, and biotechnology sectors. In addition, if the EU's call for a new implementation agreement takes hold, then it is likely to prove difficult to confine the scope to marine protected areas. While a piecemeal approach to establishing an international regulatory regime for such important ocean resources is not ideal, it appears to be the course of action underway as interested countries seek to take immediate action on threats that are seen as having devastating environmental and economic consequences.

Conclusion

The two issues addressed in this two-part series are illustrative of the increased attention that is being paid nationally and internationally to the ways in which the U.S. and other countries will explore and develop OCS and high seas ocean resources. The legal and policy frameworks that govern and guide such activities are very much in transition, and the changes being advocated in these areas will have important consequences for affected commercial interests.