

EELF Conference 2017 København

Dr Bjørn-Oliver Magsig
BjornOliver.Magsig@UCC.ie

A TRADITION OF
INDEPENDENT
THINKING



UCC

University College Cork, Ireland
Coláiste na hOllscoile Corcaigh



An International Agreement on Marine Biological Diversity of ABNJ (and the EU)

A TRADITION OF
INDEPENDENT
THINKING



University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Overview

- Agreement on marine biological diversity of ABNJ
 - Problematique
 - Current legal framework
 - Gaps & challenges
 - Current status of negotiations
- The role of the European Union
 - Contentious issues

Problematique

- Catalogue of threats to marine environment & biodiversity increases
 - Fishing
 - Shipping
 - Oil & gas
 - Laying of cables & pipelines
 - Deep seabed mining
 - Marine scientific research
 - Bioprospecting
 - Discovery and commercialisation of new products based on biological resources
 - Geoengineering
 - E.g. ocean fertilisation

Current legal framework

- UN Convention on the Law of the Sea (UNCLOS)
 - Constitution for the ocean
 - Huge in scope & detail (320 articles)
 - 1994 Agreement on the Implementation of Part XI [deep seabed mining]
 - 1995 Agreement on Highly Migratory and Straddling Fish Stocks
 - Marine environment (Part XII)
 - One of the oldest & most important multilateral environmental agreements
 - 'States have the obligation to protect and preserve the marine environment' (Art 192)
 - Extended & developed by 1992 Convention on Biological Diversity

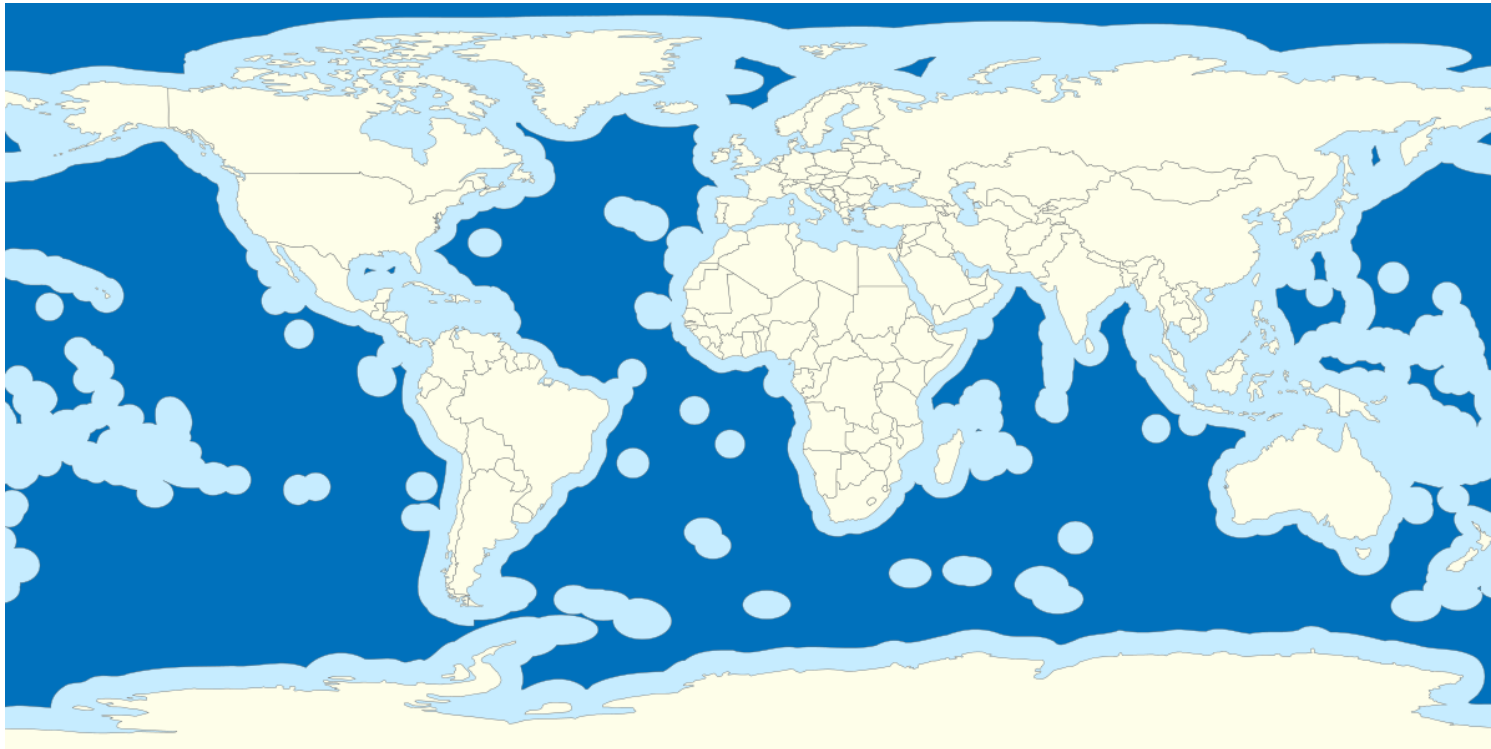
Current legal framework

- Zones of maritime jurisdiction

Maritime zone	Concept of jurisdiction
Internal waters	Territorial sovereignty
Territorial sea	
Archipelagic waters	
International straits	
Contiguous zone	Sovereign rights & jurisdiction
Exclusive economic zone	
Continental shelf	
High seas	Commons (freedoms of the high seas)
Deep sea-bed (Area)	Common heritage of mankind

Current legal framework

- High seas
 - 62% of the ocean
 - 45% of the earth's surface



Gaps & challenges



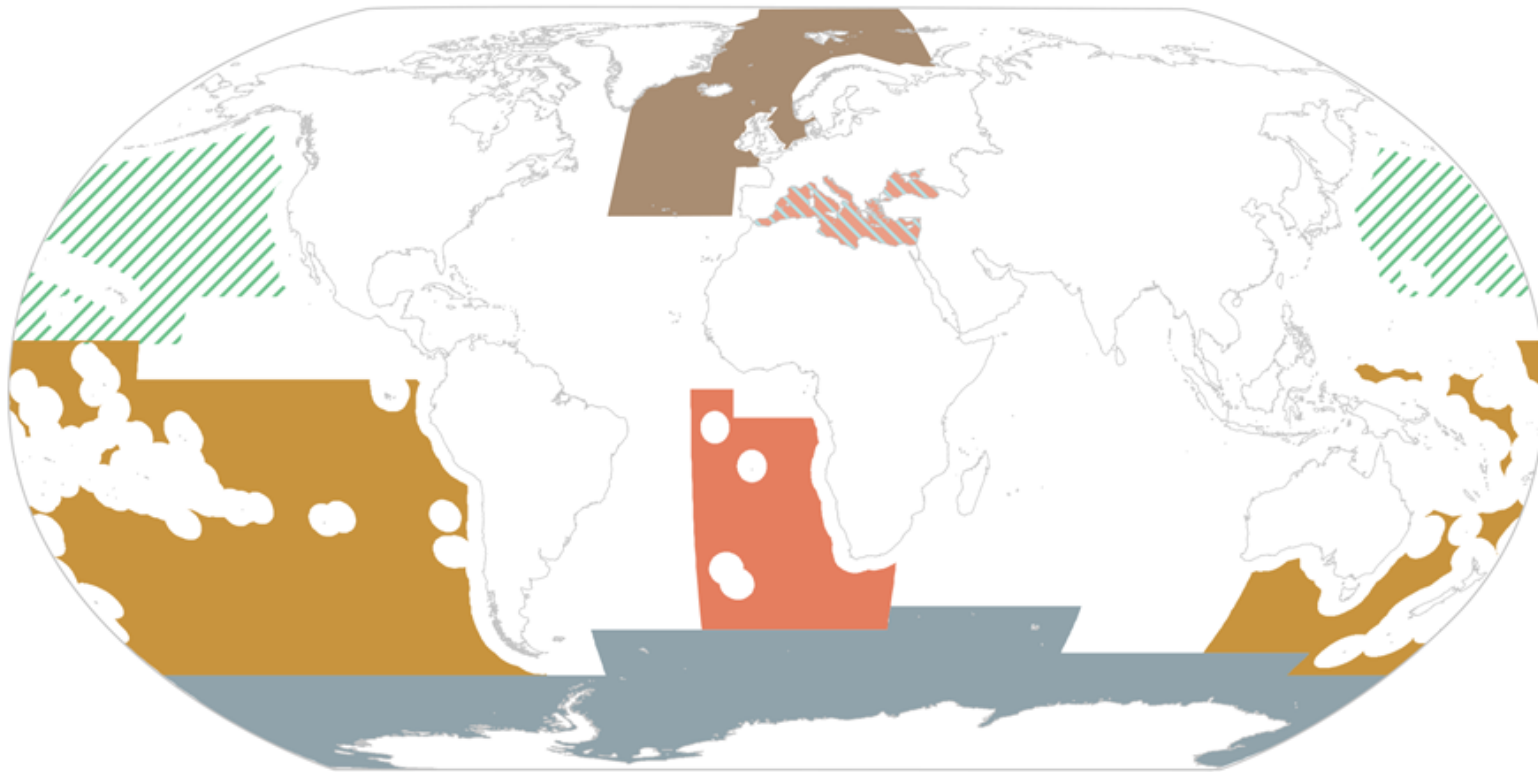
Abbreviation	Full name
Regional fisheries management organizations	
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tuna
IOTC	Indian Ocean Tuna Commission
NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
NPAFC	North Pacific Anadromous Fish Commission
NPFC	North Pacific Fisheries Commission
SEAFO	South East Atlantic Fisheries Organization
SIOFA	South Indian Ocean Fisheries Agreement
SPRFMO	South Pacific Regional Fisheries Management Organization
WCPFC	Western and Central Pacific Fisheries Commission

Abbreviation	Full name
Regional seas organizations	
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
MAP	Mediterranean Action Plan for the Barcelona Convention
OSPAR	OSPAR Commission (from the Oslo and Paris Conventions)
SPREP	Secretariat of the Pacific Regional Environment Programme
Global/sectoral organizations	
CITES	(The Conference of Parties to) The Convention on International Trade in Endangered Species of Wild Fauna and Flora
IMO	International Maritime Organization
ISA	International Seabed Authority
IWC	International Whaling Commission

© The Pew Charitable Trusts

Gaps & challenges

- Able to create legally binding measures for ecosystem management



CCAMLR GFCM NPFC MAP OSPAR SEAFO SPRFMO

Gaps & challenges

- 20 high seas governance organisations
 - None with comprehensive cross-sectoral mandate with regulatory authority and a focus on conservation in ABNJ
- Convention on Biodiversity
 - Art 5 limits obligations of parties in relation to conservation & sustainable use of biodiversity in ABNJ
 - Duty to cooperate directly or through competent international organisations
 - No direct obligation on parties to conserve or sustainably use the components of marine biodiversity in ABNJ

Gaps & challenges

- Weaknesses of current governance
 - Many unregulated activities
 - Geographic gaps
 - Uncoordinated rulemaking
 - Poor implementation
 - Weak enforcement provisions

- New agreement needed
 - Mechanism to enable robust and coordinated high seas governance for the conservation and sustainable use of marine biodiversity in ABNJ

Gaps & challenges

- 2010 meeting of the Convention on Biological Diversity
 - States committed to conserve 10 percent of marine environments
- UN Sustainable Development Goal 14
 - Conserve and sustainably use the oceans, seas and marine resources
 - Target: By 2020, conserve at least 10 percent of coastal and marine areas, consistent with national and international law and based on the best available scientific information
- So far, less than 1 percent of the high seas are fully protected...

Current status of negotiations

- 2004-2015
 - UNGA Res 59/24: Ad hoc open-ended informal working group
 - Study issues relating to the conservation & sustainable use of biodiversity in ABNJ

- 2011: 4th meeting of working group
 - ‘Package deal’ agreed by consensus
 - Set of recommendations to initiate a process on new legal framework
 - Marine genetic resources (MGRs), including questions on benefit-sharing
 - Measures such as EIAs and area-based management tools (ABMTs), including MPAs
 - Capacity building and marine technology transfer

Current status of negotiations

- 2015: UNGA Res 69/292
 - Development of legally binding instrument under UNCLOS
 - Implementing agreement
 - Establishment of a Preparatory Committee
 - Substantive recommendations
 - Before 72th session (in 2018) UNGA will decide on the convening & starting date of an Intergovernmental Conference (IGC)
 - Process should not undermine existing legal instruments and frameworks

Current status of negotiations

- PrepCom 2016-17
 - State parties to UNCLOS, non-member states, IGOs, NGOs
 - Informal Working Groups
 - Access to marine genetic resources & benefit sharing
 - Area-based management tools, including MPAs
 - Environmental impact assessments
 - Capacity building & transfer of marine technology

Current status of negotiations

- Marine genetic resources
 - Freedom of the high seas v common heritage of mankind

- Elements
 - Access to MGRs & benefit sharing

- Existing instruments
 - FAO International Treaty on Plant Genetic Resources (2001)
 - Nagoya Protocol to CBD (2010)

Current status of negotiations

- Area-based management tools, including MPAs
 - No competent & legitimate international body
- Elements
 - Global mechanism
 - Ecosystem & precautionary approaches
 - Conservation objectives / Mgmt plans
 - Coordination with sectoral/regional bodies
- Existing instruments
 - UNCLOS, CBD, OSPAR & Barcelona Conventions

Current status of negotiations

- Environmental impact assessment
 - Customary international law
 - No globally agreed procedure

- Elements
 - Thresholds
 - Procedures for EIA
 - Public notification / transparency
 - Decision making
 - Cumulative impacts

- Existing instruments
 - Espoo Convention, Kiev (SEA) Protocol
 - Case law: e.g. Pulp Mills, ITLOS Advisory Opinion on the Area

Current status of negotiations

- Capacity building & technology transfer
 - Part XIV of UNCLOS

- Elements
 - Develop tools
 - Strengthen capabilities
 - Public and private sectors

- Existing instruments
 - Intergovernmental Oceanographic Commission – Criteria and Guidelines on the Transfer of Marine Technology

The role of the EU

- Major interests in negotiations
 - Biodiversity protection & establishment of MPAs
 - Environmental impact assessment & strategic environmental assessment
 - Transfer of marine technology & capacity building
 - Light regime for the use of marine genetic resources
- Support for new treaty from the beginning

The role of the EU

- Only international organisation party to UNCLOS
- Working Party on the Law of the Sea
 - Prepares draft EU positions within bodies set up under UNCLOS
 - Drafts common positions on foreign policy issues of general interest concerning the development of the law of the sea and its repercussions on EU foreign policy
 - Examines consistency of projects and proposals submitted to the Council concerning the law of the sea, and in particular of UNCLOS

Positions of the EU

- New treaty and UNCLOS
 - EU recommended clarifying that new treaty would be implementing agreement under UNCLOS & proposed emphasising central role of UNCLOS vis-à-vis role of other existing, relevant legal instruments and frameworks

- Principles and approaches
 - EU called for strategic environmental assessments (SEAs) of cumulative effects
 - EU suggested mitigation hierarchy and no-net biodiversity loss as EIA-specific approaches
 - Supported by Canada & IUCN, but questioned by US & Japan

Positions of the EU

- Principles and approaches
 - EU & the African Group supported including the precautionary principle, rather than precautionary approach
 - US, Canada, New Zealand, Fiji & Australia preferred precautionary approach

- Balance between conservation and sustainable use
 - Russia, Norway, Iran: 'balancing' conservation and sustainable use
 - EU, US, Australia, New Zealand, Japan: 'promoting both' conservation and sustainable use
 - Senegal: 'promoting the balance'

Positions of the EU

- Benefit sharing
 - EU favoured focusing on non-monetary benefits
 - But suggested new treaty to set out the 'types of benefits that could be shared'
- Area-based management tools
 - EU called for including MPAs established under existing bodies in new MPA network & further elaborating on compatibility
 - EU called for designating MPAs for an indefinite period
 - Establishing a regular review to allow for modifying, amending or de-designating MPAs
 - China, Japan recommended MPAs should be terminated once targets are achieved

Positions of the EU

- Environmental impact assessment
 - EU recommended reference to customary international law, as clarified by ITLOS
 - EU underscored importance of thresholds & criteria for determining when an EIA should be conducted

- Capacity building and technology transfer
 - EU prioritised objective to assist states, in particular developing ones, in fulfilling their treaty obligations
 - Recommended clarifying that conservation & sustainable use are the overall treaty objectives
 - EU favoured using existing funding sources

The way forward

- Most delegations believe PrepCom has completed its mandate
 - Still a few caution against prejudging the General Assembly's decision on convening an intergovernmental conference (IGC)
- European Union
 - Unresolved issues to be addressed by IGC
 - Conference should be convened in 2018, as the 'correct forum for consolidating work, compromising and arriving at a balanced outcome.'
- Too early to say if we are on course for developing bold treaty with 'teeth & vision'