

Environmental protection in the marine environment within and beyond national jurisdiction

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Setting the scene

Earth's oceans and seas increasingly affected by human activities

A complex poorly-known environment under increasing pressure

A complex and often piece-meal legal framework for marine management

What is the 'marine environment'?

A plethora of definitions across international, European Community and national law

Example: 'Marine environment' 'includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof' [source: ISA's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, 2000, Regulation 1 (3)(c)]

features of historic or archaeological interest

What are the activities?

Extractive and non-extractive

Familiar examples:

fishing

navigation

oil and gas

dumping

military exercises

Less familiar examples:

bioprospecting

marine scientific research

renewables

CO₂ sequestration

military sonar development

Climate change, including ocean acidification

Effects: direct, indirect, cumulative, synergistic

High scientific uncertainty about nature of effects in many cases

Within and beyond national jurisdiction

Principal zones within:

internal waters [within baseline]

territorial sea [out to 12 nm]

EEZ [out to 200 nm]

continental shelf [out to 200 nm or potentially beyond]

Zones beyond:

high seas

the Area

Also: boundaries between neighbouring coastal States

Nature does not observe these zones or boundaries!

Within and beyond national jurisdiction

Churchill and Lowe, 1999:

‘The universal establishment of 200-mile EEZs would embrace about **thirty-six per cent** of the total area of the sea’

[source: R.R. Churchill and A.V. Lowe, The Law of the Sea, 3rd edition, Juris Publishing, Manchester, 1999, page 162, emphasis added]

Laws relevant to environmental protection

Environmental protection laws

[e.g. Convention on Migratory Species or EC Habitats Directive]

Resource management laws

[e.g. UN Fish Stocks Agreement or EC Common Fisheries Policy Regulations]

Other sectoral laws

[e.g. UK's Food and Environment Protection Act 1985, Part II]

Procedural laws

[e.g. Aarhus Convention]

What can the law relevant to environmental protection do?

Examples:

- establish **standards**, e.g. IMO treaties
- establish **organisations or institutions**, e.g. treaties establishing RFMOs
- establish **liability regimes**, e.g. Annex VI to Madrid Protocol (Antarctic Treaty)
- establish **dispute settlement regimes**, e.g. Part XV of LOSC

Procedural law

Examples:

- **access to information:** procedures and exceptions
- **participation:** role of stakeholders, and means and timing of participation
- **access to justice:** test of standing, rules on costs
- **data protection:** what is 'protected' and what is not?

Aarhus Convention: 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Levels of law

What levels of law are involved?

- **international** law
- **European Community** law
- **national** law
- **sub-national** law (e.g. laws made by devolved administrations)

Interactions within and between these levels

International law

Sources: principally customary international law and treaty law

‘Soft’ law, e.g. the FAO’s International Plan of Action on IUU fishing

Treaties – **global** (e.g. LOSC), **regional** (e.g. NEAFC Convention), **sub-regional** (e.g. CSRP Convention [West Africa]), **bilateral** (e.g. Halibut Convention)

International organisations, such as regional seas agreements, RFMOs, IMO, ISA, IWC and an array of CoPs and MoPs, generate measures (sometimes binding) and processes

European Community law

Legal basis for EC: Treaty establishing the European Community

Types of EC secondary legislation: Directives, Regulations, Decisions

Where applicable: within EC and potentially further afield (e.g. via vessels and nationals)

Law enforcement: European Court of Justice

Examples:

- Common Fisheries Policy Regulations
- nature conservation Directives

National laws

‘Own initiative’ laws or laws implementing international law and (in the case of EC Member States) EC law

Proliferation of national maritime policies?

Reaching beyond national waters with national laws

Relevance of land-locked States’ national laws – e.g. the role of flag States

Example: UK’s draft Marine Bill – and effects of devolution

Outlining the challenges

Some major **legal** challenges

- (1)** Filling some legislative gaps – for zones or activities
- (2)** Improving synergies between existing legal regimes
- (3)** Enforcement

Filling some legislative gaps

Examples:

- areas of high seas without relevant RFMOs or regional sea organisations
- amending global regimes to deal with new activities, e.g. CO₂ sequestration or ocean fertilisation
- creating global regimes to deal with new activities, e.g. access to genetic resources in the Area

Improving synergies between legal regimes

International law

Example: regional seas organisations (e.g. OSPAR) working with RFMOs (e.g. NEAFC)

European Community law

Example: EC Member States, when implementing Habitats Directive, requesting legislative response by EC under Common Fisheries Policy

National law

Example: devolution – cooperation

Enforcement

Design of laws, e.g. simplification of EC Common Fisheries Policy Regulations

Participation of stakeholders in development of laws, e.g. US fisheries management councils

Resources, e.g. port State control cf. at-sea monitoring

Technology, e.g. satellite VMS, electronic logbooks

Making maximum use of powers, e.g. market-related measures by RFMOs

Some ways of addressing major challenges

Creativity, and thinking outside one's own sector

Political will (including funding)

Participation by stakeholders – environmental, economic, social

Data – increasing availability of existing data and generating new data

Provoking the debate

- (1) An ecosystem approach
- (2) Spatial measures *beyond* MPAs
- (3) Involving stakeholders
- (4) Using the law

An ecosystem approach

Moving towards an ecosystem way of thinking

Thinking in terms of goods and services

Valuation of goods and services – science, law and economics

Choosing societal priorities

Obtaining more knowledge

Creating or amending institutions and processes, to allow joined-up thinking and action

Spatial measures *beyond* MPAs

Marine planning to achieve sustainable development

Should networks of MPAs inform marine plans or vice versa?

Example: UK draft Marine Bill - timing

Superimposing marine planning on an array of existing activities and MPAs

Content, and hence influence, of marine plans

Involving stakeholders

From estuary management to high seas governance

Value of *real* participation – acknowledgment that this process can be time-consuming and expensive

Making a forum legitimate, inclusive and meaningful (this is hard – an opportunity to learn from other sectors?)

Example: what would a stakeholder forum for governance of the high seas look like?

Using the law

Knowing what the law allows – displacing dogma

Examples:

- Member States' delegated powers under EC Common Fisheries Policy
- relationship between CCAMLR Convention and International Convention for the Regulation of Whaling

Possibility of **testing** the law – albeit with resulting risks

Learning from mistakes and successes

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