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Marine Genetic Resources and the Imperfect UNCLOS Framework

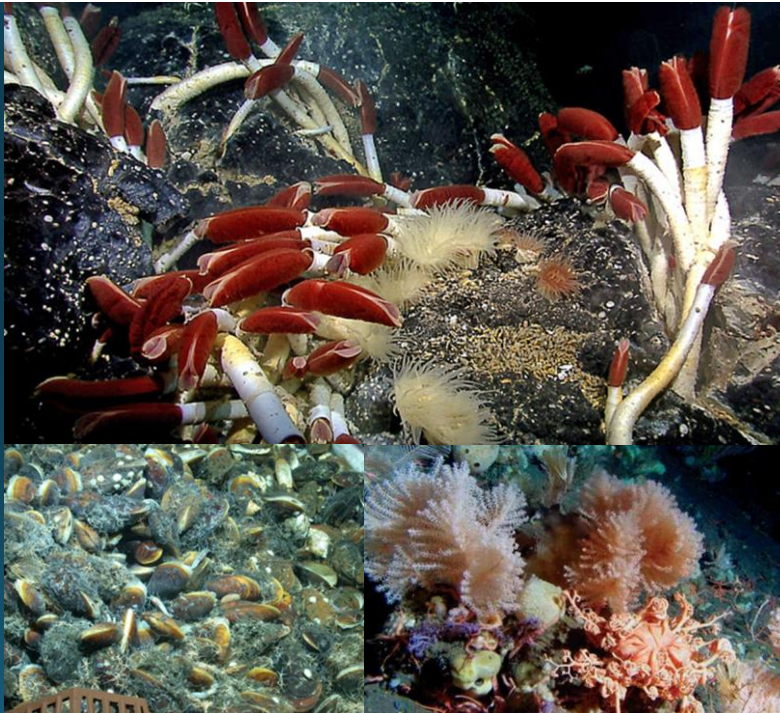
Overview

- Background to the MGR debate
- The water-seabed distinction in the law of the sea
- Why the water-seabed distinction is problematic in the context of MGRs
- Possible options for avoiding the water-seabed distinction in the new international legally binding instrument on protecting marine biodiversity beyond national jurisdiction (BBNJ)

Protection of marine biodiversity in areas beyond national jurisdiction (BBNJ)

- UNGA Resolution 69/292 established a preparatory committee to make recommendations on a draft text of an international legally binding instrument (ILBI) covering:
 - Marine genetic resources including questions on the sharing of benefits
 - Area-based management tools, including marine protected areas
 - Environmental impact assessments
 - Capacity building and the transfer of marine technology
- Following four Prepcoms, the parties agreed to recommend the UN approve the negotiations for a new agreement.

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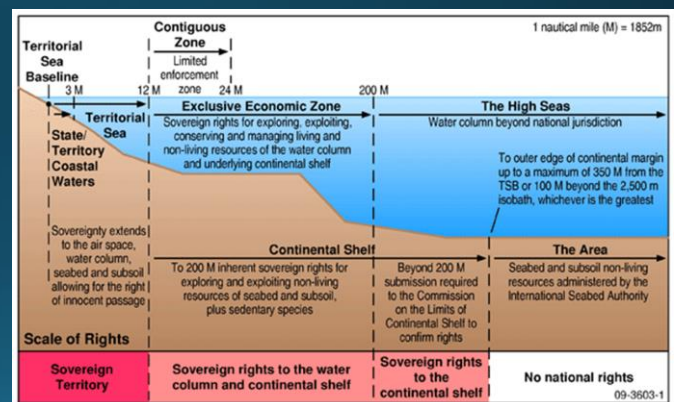


Positions taken regarding MGRs in BBNJ

1. MGRs in the Area are covered by the principle of common heritage of mankind (CHM).
2. MGRs are not covered by Part XI UNCLOS, but should be brought within CHM.
3. MGRs beyond national jurisdiction are governed by the freedom of the high seas
4. Uncertainty about the legal status of MGRs
5. A sui generis, unique, regime should be developed for MGRs

Seabed-water distinction in the law of the sea

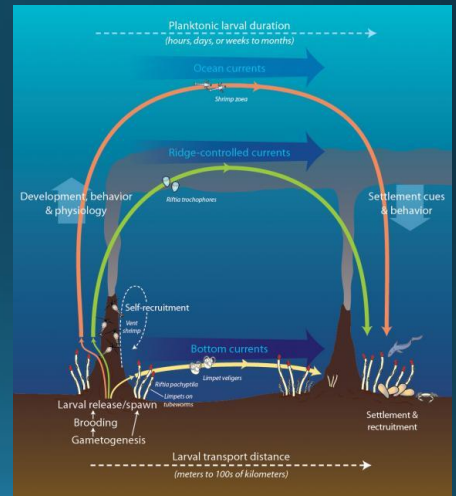
1. Development of the continental shelf doctrine
2. EEZ/Continental shelf in UNCLOS
3. Area v high seas in UNCLOS



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Why a seabed-water distinction is inappropriate for MGRs

- Benthic ecosystems host a variety of living species
 - Hydrothermal vents
 - Seamounts
 - Cold seeps
- No clear seabed-water paradigm
- The life cycle of sessile species often includes a water-borne phase
- Environmental DNA collection makes the distinction meaningless.



Woods Hole Oceanographic Institution

Can we use “sedentary species”?

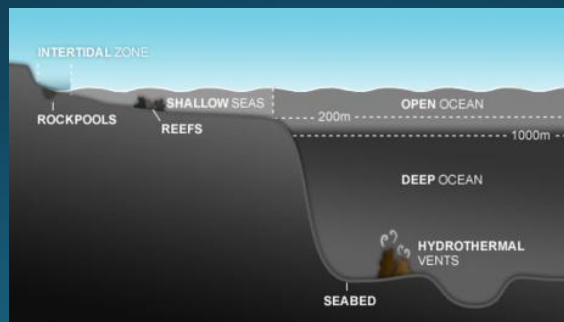
- The sedentary species definition in art 77(4) was developed for the 1958 Continental Shelf Convention and adopted unchanged in UNCLOS.
- For commercial fish species, the definition has caused confusion and debate.
- The application to MGRs would lead to a “fractured regulatory approach”.
- Problems with applying the definition to MGRS
 - What is the harvestable stage?
 - Which species are immobile or unable to move?
- The new agreement could address these problems

Monterey Bay Aquarium RI



Possible alternative approaches

1. Ecosystem-based distinction
2. Integrated approach



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Ecosystem-based distinctions

1. Identify types of ecosystems that have special rules, e.g. hydrothermal vents (Leary 2007).
2. Create a "benthic zone" to which special rules apply.
 - Avoids worst problems arising from seabed-water distinction
 - BUT retains a bifurcated approach
 - Definitional problems
 - Concern about monitoring and enforcement

Integrated approach

- Applies the same legal principles to all MGRs collected outside national jurisdiction.
- Many options for the legal principles that apply.
- Most important is that all MGRs covered.
- Some indications in the reports of the Preparatory Committee that some states are coming to this perspective.
- BUT: significant political obstacles

Conclusion

- Calls for a regime on MGRs to apply different legal principles to organisms found on the seabed and in the water column fail to recognise the practical difficulties.
- It therefore makes sense that any legal regime for MGRs beyond national jurisdiction resolves potential practical problems.
- The best outcome would be a regime that applies the same legal outcomes to MGRs in the water column and the seafloor.
- The “sedentary species” approach is not ideal – and the agreement may need to clarify the way the regime interacts with the continental shelf regime.