

Legal, regulatory, and institutional framework for the Blue Economy

Situation statement

The fact that the Blue Economy spans a number of different sectors, with significant potential synergies, provides positive incentives for moving toward better integrated legal, regulatory, and institutional frameworks. At present, policy incoherence, weak enforcement, and legislative gaps contribute to the fragility of existing frameworks. The absence of adequate institutional mechanisms to facilitate interdepartmental collaboration or an overall coordinating body makes it difficult for institutions to work beyond their immediate mandates. This is evidenced by the higher level of maturity of institutions and governance frameworks for action and coordination in some established sectors, as opposed to what is seen in emerging sectors. The mature sectors, therefore, could provide valuable lessons to the nascent sectors. Above all, the Blue Economy offers a new dynamic that could be used to mobilize new interinstitutional linkages across different sectors, marshal support for necessary reforms, and fill existing gaps in legislation and enforcement mechanisms. This could be done at various levels, including national, regional, and international, as deemed appropriate.

Challenges

The establishment and development of effective legal, regulatory and institutional frameworks for the Blue Economy are crucial steps toward structuring and guiding its growth. Legal, regulatory, and institutional frameworks require thorough review in order to understand the Blue Economy's institutional environment, identify existing gaps, and take advantage of collaborative synergies.

Cultivating adequate awareness of existing applicable legal frameworks and instruments at both the international and regional levels is an important part of understanding the Blue Economy. From the oceans perspective, UNCLOS, which was adopted in 1982 and entered into force in 1994 is widely recognized as the

general legal framework within which all activities in the oceans and seas must be carried out. This convention also outlines the rights and obligations of States in carrying out these activities, including those relating to navigation, living and nonliving resources, protection and preservation of the marine environment, marine scientific research, and development and transfer of marine technology, in all maritime areas provided for in the convention. It provides the means for achieving legal certainty in a number of areas, including the delineation of maritime zones.

With regard to maritime zones delineation, clearly defined and duly publicized limits of maritime zones are an essential basis for States to derive benefits from the oceans and their resources. These limits provide certainty with regard to the extent of the sovereignty or sovereign rights and jurisdiction of coastal States, thereby creating a fundamental precondition to attracting investments for exploration and exploitation activities. Under UNCLOS, the CLCS assists coastal States in the establishment of the outer limits of the continental shelf.³⁸ The sustainable use of nonliving resources, including those in the sea floor and subsoil, is crucial in the development of a sustainable ocean-based economy, particularly for developing coastal States.

The Convention on the Law of the Sea contributes to the strengthening of peace, security, cooperation, and friendly relations among all nations, as well as to the promotion of the economic and social advancement of all peoples of the world, and to the sustainable development of the oceans and seas.

The high rate of ratification of this instrument by African States is encouraging and a valuable step forward. However, there remain considerable challenges with regard to implementation, including harmonization of national laws with relevant provisions and uniform and consistent application of these provisions. Implementation of UNCLOS requires domestic legal, policy, and institutional frameworks, as well as cross-linkages with other sectors.

The framework provided by UNCLOS takes into account the possibility of adopting other agreements to facilitate the implementation of its provisions. The convention is thus complemented by two implementing agreements. The 1994 Agreement Relating to the Implementation of Part XI of the Convention on the Law of the Sea is relevant to the exploration and exploitation of the resources of the international seabed area (known as the Area), which is considered to be the “common heritage of mankind.” In other words, the benefits of economic gains from activities in the Area are to benefit all of humanity. The Area is

38 http://www.un.org/depts/los/clcs_new/clcs_home.htm (accessed 27 November 2015)

administered by the International Seabed Authority (ISA). At present, no African States are sponsoring any activities in the Area. The 1995 Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (United Nations Fish Stocks Agreement), provides the framework for States, in cooperation with regional fisheries management organizations, to sustainably exploit the resources of their Exclusive Economic Zones (EEZs), as well as those of the high seas. Many African States are as yet unable to fully exploit these resources; instead, they usually issue licenses to fleets from other continents.

There are a series of other binding international conventions whose provisions need to be kept in view. An indicative list would include the Convention on Wetlands of International Importance (Ramsar Convention); Convention on Biological Diversity (CBD) and Jakarta Mandate; Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention); International Convention for the Prevention of Pollution from Ships (MARPOL); African Maritime Transport Charter; African Convention on the Conservation of Nature and Natural Resources; and the World Heritage Convention. Member states of the World Trade Organization (WTO) also have obligations and rights with respect to trade that may have implications for economic activities and institutions within the Blue Economy.

Integrating the Blue Economy paradigm into the context of the existing multiplicity of soft law instruments (i.e., voluntary, nonbinding, or aspirational agreements), which were designed to bolster existing institutional arrangements, also poses a challenge with regard to harmonization and coordination efforts.

An important development with regard to the resources of areas beyond national jurisdiction is the recent decision by the UNGA (Resolution 69/292 of 19 June 2015) to develop an international, legally binding instrument under UNCLOS on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.³⁹

A preparatory committee will start its work in 2016 and by the end of 2017 shall make substantive recommendations to the UNGA on the elements of a draft text covering, in particular, “marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and

39 http://www.un.org/depts/los/general_assembly/reports/report_70.pdf (accessed 27 November 2015)

capacity-building and the transfer of marine technology.”⁴⁰ The participation of African States in a coordinated manner in these negotiations is important and will depend to some extent on availability of resources, particularly financial resources. The establishment, in accordance with the resolution, of a special voluntary trust fund for the purpose of helping developing countries — particularly the least developed countries, land-locked developing countries, and SIDS — to attend the meetings of the preparatory committee and the intergovernmental conference is expected to address this challenge. The effective participation of African States in this process is also influenced by the need for representatives with a good appreciation of the issues.

The implementation and application of legal frameworks and instruments for pursuing the development of the Blue Economy also require negotiation skills; however, technical capacity and institutional gaps remain at the national level. These challenges can be demonstrated, for example, in the climate change agreements and Africa’s limited benefits, which are exclusively limited to funding and investments for green, low-carbon growth. Africa’s limited participation to date in the Clean Development Mechanism (CDM) and carbon trading arrangements under the Kyoto Protocol is a demonstration of the prevailing information, negotiation, and technical skill constraints.⁴¹ With concerted effort, these barriers to awareness can be overcome, and leveraging by States of international legal instruments can help shape effective national Blue Economy-related institutional structures, policy processes, and regulatory regimes.

Another central challenge at the national level is the insufficient intersectoral coordination combined with the scarcity of central coordinating institutions for the Blue Economy (e.g., ministries, commissions, or units). Matching regulatory and institutional choices with appropriate budget mechanisms is essential.

40 *Ibid*

41 http://www.unicef.org/esaro/Climate_Change_in_Africa.pdf

Opportunities

Most African States have ratified UNCLOS. The Blue Economy presents a unique opportunity for these States to translate their political commitment into tangible and effective implementation and assertion of their rights under the convention as well as the related observation of their duties. The recent agreement by States to begin a process of negotiations toward an implementing agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction presents another opportunity for African States to demonstrate their commitment to agreed international principles for the conservation and sustainable use of marine resources. Indeed, African States are encouraged to actively participate in this process and to continue to cooperate in negotiating outcomes that would favor their sustainable development aspirations and ensure fair consideration of Africa's interests.

The convention provides rights of access to the sea and transit rights to what it defines as land-locked States. Coastal African States can facilitate these rights through effective transit agreements with land-locked States in order to reduce the costs of trade and increase their participation in and benefits from the Blue Economy.

Since all States can benefit from the resources of the Area, the Blue Economy could galvanize those African States which are not yet parties to the convention to ratify it in order for them to profit from the Area, as well as from other resources of the oceans. The Blue Economy also provides an opportunity for participation in the ISA, which regulates all activities in the Area (see case study 7). It also creates a favorable climate for sustained participation in other international and regional organizations relevant to the Blue Economy.

Case study 7

The Area

UNCLOS states that the seabed and subsoil located beyond national jurisdiction, known as the “Area,” and its mineral resources are the common heritage of mankind. It also establishes the ISA, an autonomous international organization within the United Nations system through which States that are party to the convention organize and control activities in the Area, particularly with a view to management of its mineral resources.

All States party to UNCLOS are automatically members of the ISA. Under UNCLOS, the ISA has the responsibility to process applications, monitor activities, and adopt rules and regulations for the conduct of exploration and mining activities in the Area.

Between 2000 and 2010, eight companies signed contracts with the seabed authority for the exploration of polymetallic nodules. As of 1 June 2015, this number is 22, which includes the exploration of polymetallic sulfides, polymetallic nodules, and cobalt-rich ferromanganese crusts from several Pacific Small Island Developing States (SIDS).

The drivers behind the requests for mineral exploration sites in the Area include: (a) the strategic importance of participating in the international seabed regime; (b) the economic and strategic value of the exploration sites granted by the ISA; (c) the need for the identification of new strategic reserves; (d) the expansion and protection of the national mining sector; and (e) the need for development of scientific knowledge and mastering new technologies.

Lesson

The increased issuing of licenses by the ISA, including to a number of SIDS from the Pacific region, provides a motivation for African States to explore avenues for their enhanced participation in the international seabed regime.

The awareness of current and future activities in the seabed Area that are of consequence for African States is important, as is a proper understanding of the process and steps leading to the exploration and exploitation of the resources of the Area (see case study 8).

Case study 8

Access to resources of the international seabed area: the case of Nauru¹

Having experienced at first hand the drastic negative impacts of mining, the small Pacific Island state of Nauru has a strong incentive to support better mining practices. Nauru has recently become the first Pacific Island State to express interest in engaging in seabed minerals activities in the Area. It has passed an International Seabed Minerals Bill on 23 October 2015, which governs its engagement in seabed mineral activities undertaken within the Area. The act provides for Nauru to either sponsor directly or to apply in partnership with a commercial or strategic entity (registered in Nauru) to the ISA to conduct exploration activities.

The legislation, which has been adopted within the context of the Pacific Community—European Union-supported Deep Sea Minerals Project (DSMP), is essential in order to ensure that such activities are environmentally well-managed and economically viable. Through the act, Nauru can exercise its effective control over contractors conducting seabed mineral activities in the Area. The act also contains measures to ensure that Nauru adheres to the rules and regulations of the ISA.

The act establishes a Nauru Seabed Minerals Authority (NSMA), which will be responsible for monitoring and managing Nauru's involvement in seabed mineral activities. Further, revenues generated from such activities will be vested in a Seabed Minerals Fund, which will be managed for the benefit of the people of Nauru. The act recognizes that prospective activities can only be conducted through sponsorship of a member state of the ISA and in accordance with the rules and regulations adopted by the ISA.

Lesson

The key lesson from the Nauru case is that national legislation to regulate access to seabed resources is important in order to pursue development of these resources at the national level and in accordance with international laws.

1 <http://www.spc.int/en/media-releases/2297-spc-welcomes-naurus-new-legislation-to-govern-seabed-mining-activities.html> (accessed 27 November 2015)

At the national level, beyond mainstreaming regional and international legal frameworks, there are opportunities such as consideration of creating a Blue Economy Ministry, a comparable institution, or a national coordination unit, which would advance the adoption of the Blue Economy approach in national and sectoral development. There is also scope for the development and enhancement of accounts and budget-related legislation, as well as legislation establishing transparency parameters in order to have the necessary financial and economic underpinnings (sectoral, macroeconomic).

The fact that many African States participate in the 1995 United Nations Fish Stocks Agreement also means that they can seize the opportunity to enter into more cooperative resource sharing agreements in order to maximize the sustainable exploitation of the rich fishing grounds in their EEZs. Where possible, this can be done by leveraging partnerships and entering into joint conservation and management agreements. Furthermore, African States could cooperate in concluding additional instruments that complement UNCLOS, taking into account their regional context.

The multiplicity of aspirational instruments, such as the outcome document of Rio+20, the 2030 Agenda for Sustainable Development, the AU Agenda 2063, the 2050 AIMS, the SAMOA Pathway, and the Addis Ababa Action Agenda on Financing for Development, also present African States with the chance to incorporate in an integrated manner sustainable development principles and other relevant provisions into their Blue Economy policy and regulatory frameworks. Additionally, there are sector-specific voluntary instruments whose provisions member States could consider for inclusion in their national policies and legislation. This would strengthen the ability of States to realize the aspirational goals outlined in these instruments. NCAs provide a case in point. The inclusion of this kind of aspiration in national legislation would allow for the full recognition of nontraditional forms of capital in national accounts.

Policy guidance

Specific national conditions shape the required legal and institutional policy guidance; however, based on best practices, strengthening of legal and institutional capacity for the Blue Economy should take into consideration the need for the following:

- Ratification of UNCLOS and its implementing agreements by States that have not yet done so and implementation through national legal and policy instruments.
- Ratification of other relevant ocean governance instruments, as well as those relating to freshwater bodies (see page 60) and other natural resources.
- Revision and adoption of legislation and policies addressing criminal activities at sea as well as other threats to the marine environment.
- Negotiation and delimitation of maritime boundaries and utilization of conflict resolution mechanisms for peaceful dispute settlement.

- Engagement in training and capacity building of officials involved in relevant Blue Economy sectors about applicable international law and legislation, as well as regional and subregional instruments and policies.
- Development of integrated maritime strategies in line with the AU 2050 AIMS.
- Establishment of “academic centers of excellence” on the Law of the Sea (e.g., re-equipping and refocusing geological surveys for the Blue Economy’s various sectors), if possible within existing institutions. This may take the form of creating new departments in the Blue Economy within existing universities or “think tanks.”
- Establishment of a coordination mechanism for aquatic and marine-related departments/institutions. At the national level, this can take the form of a dedicated ministry or interministerial committees (see case study 9 on country institutional options for coordination). At the continental level, this may be achieved through a stand-alone full-fledged Department of Maritime Affairs in the AUC in Addis Ababa, Ethiopia.
- Enhancement of dialogue and consultations at regional and continental levels to aggregate views and facilitate sharing of legal, policy, and institutional expertise among States in order to achieve the objectives of the Blue Economy (e.g., with regard to zones of joint development).
- Development and strengthening of the capacity of States to negotiate fair and robust contracts/agreements at all levels.
- Development of environmental policies and regulations geared toward conserving, managing, protecting, and sustainably using aquatic and marine ecosystems.
- Enhancing education, training, capacity building, and skills development of States (e.g., those related to contract negotiations, sponsoring activities in the Area, and participating in the ISA).
- Participation in negotiations and formulation of a common position regarding the development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.⁴²

42 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/292&referer=http://www.un.org/en/ga/69/resolutions.shtml&Lang=E (accessed 27 November 2015)

Box 2

Transboundary waters and the Blue Economy

Just like oceans, inland waters in lakes, rivers, wetlands, and other reservoirs contribute to socioeconomic development and environmental sustainability through fisheries and aquaculture, tourism, shipping, mining, energy, carbon sequestration, water filtration, and temperature and atmospheric regulation — the terrestrial component of Africa's Blue Carbon.¹

The region's international river basins and other freshwater sources provide Africa with immense potential for hydropower generation. Although Africa's hydropower potential is far greater than the entire continent's current electricity demands, the sector is still underdeveloped.

Socioeconomic needs such as provision of safe drinking water and sanitation, as well environmental needs such as carbon sequestration and water filtration, are all dependent on the availability of freshwater, including that which is drawn from transboundary water sources.

Africa's 63 transboundary river basins cover 64 percent of the continent's land area, providing home to 77 percent of the region's population. In order to manage the nature and dynamics of sharing an important resource such as water among countries, there are 94 international water agreements in Africa.² While the main purpose of these water agreements is to facilitate the cooperative management of the shared water, it is also important to acknowledge the extent to which such agreements seek to drive the region's Blue Economy.

1 Ababouch, L. UNECA, 2015. Fisheries and Aquaculture in the Context of Blue Economy.

2 UNEP, 2010. Africa Water Atlas.

Case study 9

Country institutional options for coordination

Mauritius¹

Mauritius has been hailed as an example for other countries to follow in the Blue Economy sector. The strengths of the approach adopted by Mauritius lie in the establishment of a policy framework which was developed through broad-based consultations with all stakeholders, including civil society and the general public. This creates a unique sense of ownership in both the process and the product, along with accountability for the implementation and achievement of stated goals and aspirations. Relevant legislation was also enacted to give effect to the policy.

The Seychelles²

The office of the prime minister of the Seychelles has dedicated an entire ministry to promotion of the Blue Economy, harnessing its vast resources as a tool to achieve sustainable development and tackle climate change. The Blue Economy Department within the Ministry of Finance, Trade, and the Blue Economy has oversight over the implementation/realization of the Blue Economy in the Seychelles. Prior to this, the Ministry of Foreign Affairs had been driving the Blue Economy concept. The dedication of a specific ministry creates room for better coordination and cooperation with other sectors, building synergies and collaborative efforts. The government of Seychelles has also recently developed a “Seychelles’ Blue Economy Roadmap: Defining a Pathway to Prosperity.”

Senegal³

A coordination mechanism was created by the president of Senegal in 2006 within the Office of the Prime Minister, with responsibility for addressing maritime security issues and the protection of the marine environment. The coordination mechanism, known as HASSMAR⁴, is mandated to work with other relevant (maritime) agencies to operationalize national plans and interventions at sea. The geographical scope of operation includes maritime and fluvial waters and ports of Senegal. By locating this coordination mechanism at the highest level of the political machinery, the breakdown of coordination that is seen in many countries in the region is prevented.

South Africa⁵

The Operation Phakisa initiative was launched in June 2014 as a framework to create development and wealth from South Africa’s Blue Economy. It identifies four priority

- 1 United Nations Conference on Trade and Development (UNCTAD), 2014. The Oceans Economy: Opportunities and Challenges from Small Island Developing States.
- 2 http://www.mfa.gov.sc/static.php?content_id=36&news_id=967 (accessed 27 November 2015)
- 3 <http://www.jo.gouv.sn/spip.php?article4968> (accessed 27 November 2015)
- 4 Haute autorité chargée de la coordination de la Sécurité Maritime et de la Sureté Maritime
- 5 <http://www.operationphakisa.gov.za/Pages/Home.aspx> (accessed 27 November 2015)

Case study 9 (contd.)

sectors as new growth areas in the ocean economy: transport and manufacturing, offshore oil and gas, aquaculture, and protection and governance. The objective of Operation Phakisa is to grow these sectors in order to derive value for the country. The office of the president serves as a special-purpose vehicle to coordinate this initiative. In the transport and manufacturing sectors, the aim is to capture benefits related to storage and warehousing, ship-building and repair, rig repair and refurbishment, and boat building, all of which are expected to increase the GDP and the number of jobs. In the offshore oil and gas sector, the aspiration is to create an enabling environment for exploration through mechanisms such as the policy and legislative environment, inclusive economic growth, addressing skills gaps, and overcoming infrastructure challenges. In the aquaculture sector, it is anticipated that there will be jobs generated in fish processing and marketing (participation), which will in turn improve the economic and social status of coastal communities (transformation).

The Operation Phakisa initiative allows for an assessment and prioritization of specific Blue Economy intervention areas. It is very goal-specific and focused on the achievement of national development goal targets within a specified time frame, with effective monitoring of implementation and delivery. It has identified specific outcomes that center on ensuring inclusiveness, participation, job creation, value addition, and links to industrialization, particularly in the aquaculture sector. The approach also facilitates cross-sectoral interactions and discussions by and among specialists and other stakeholders (public and private). The fact that there is a monitoring component strengthens this dialogue — the interdepartmental cooperation is led by the Department of Planning, Monitoring and Evaluation. However, each sector is led by the most relevant national department.

Brazil¹

The Interministerial Commission for Sea Resources, coordinated by a State Secretariat based on the Ministry of Defense, Command of the Navy, is composed of several ministries and State secretariats and coordinates the different plans, programs, and projects related to the Brazilian Blue Economy. The commission takes into consideration the defense of political and strategic interests of Brazil in the sea, at national and international levels, and promotes socioeconomic development through the sustainable use of the resources of the sea. An important activity carried out by the commission consists of spreading maritime awareness in Brazilian society and ensuring the quality of the marine environment by reducing vulnerability and risks to extreme events and climate variability and change.

The commission also promotes strategic partnerships with disaster control agencies at the national, state, and local levels aimed at reducing vulnerability and the impacts of extreme events. The commission increases strategic partnerships in order to improve the instruments that can contribute to regional development in the

1 <https://www.mar.mil.br/secirm/ingles/remplac.html> (accessed 27 November 2015)

Case study 9 (cntd.)

coastal zone, in conjunction with the National Policy for Regional Development. Several programs coordinated within the commission's framework are carried out in cooperation with universities, geological survey offices, and the Navy's Department of Hydrography. Included are projects for assessment of living and nonliving resources of the exclusive economic zone, continental shelf, and international seabed area. Other activities are related to coastal and oceanic management and environmental protection.

Lessons

The above examples demonstrate the importance of setting a road map and vision for sustainable development of the ocean economy; the need to establish a regulatory framework; and different institutional approaches for the Blue Economy, including setting up a ministry for the Blue Economy, coordination of the Blue Economy at a high office level, such as the office of the president, prime minister, or the creation of an interministerial coordination mechanism. The examples also highlight the importance of institutional planning, monitoring, and evaluation for the Blue Economy.