



A legal scenario analysis for marine protected areas in areas beyond national jurisdiction

Report from the Boulogne-sur-Mer seminar, 19-21 September 2011

Elisabeth Druel, Raphaël Billé, Sébastien Treyer (IDDRI)

AN INNOVATIVE METHODOLOGY

The international seminar “Towards a legal framework for the creation and management of cross-sectoral marine protected areas in areas beyond national jurisdiction” was held in Boulogne-sur-Mer from 19 to 21 September 2011. It was based on an innovative approach, using foresight methodologies to stimulate discussions on possible pathways to ensure an efficient governance of marine protected areas (MPAs) in areas beyond national jurisdiction (ABNJ). This pioneering experience helped stakeholders and experts developing strong, long-term and articulated strategies to influence international and national efforts towards stronger governance of biodiversity in ABNJ.

A SCENARIO ANALYSIS

Four legal scenarios on the establishment and management of MPAs in ABNJ were presented to the participants, and then discussed, challenged and refined. The scenarios presented in this report are those that came out of these exchanges and are all designed to be coherent, plausible and salient. During the seminar, and without ranking them, participants established a list of criteria which could allow an evaluation and comparison of their desirability and ability to deliver expected outcomes.

LESSONS LEARNT

An analysis of the feasibility of the scenarios was also conducted, which focused mainly on issues regarding the adoption of new international agreements on the protection of marine biodiversity in ABNJ, the negotiations leading to it and the implementation of existing and future legal instruments. This exercise highlighted the importance and complementary roles of three arenas (regional frameworks, the Law of the Sea Convention and the Biodiversity Convention) in the establishment and management of MPAs in ABNJ. The key conclusion pertains to the need to act at these three levels in a different manner, depending on the windows of opportunity for each of them.

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For more information about this document, please contact the authors:

Elisabeth Druel – elisabeth.druel@iddri.org

Raphaël Billé – raphael.bille@iddri.org

Sébastien Treyer – sebastien.treyer@iddri.org

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LIST OF ACRONYMS

ABNJ	Areas Beyond National Jurisdiction
BBNJ Working Group	Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction
ABS	Access and Benefit Sharing
CBD	Convention on Biological Diversity
CMS	Convention on Migratory Species
COP	Conference of the Parties
EBSA	Ecologically and Biologically Significant Area
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EU	European Union
FAO	United Nations Food and Agriculture Organisation
ICCAT	International Commission for the Conservation of Atlantic Tuna
IMO	International Maritime Organisation
IOC/UNESCO	Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organisation
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUU	Illegal, Unreported and Unregulated fishing
MCS	Monitoring, Control and Surveillance
MPA	Marine Protected Area
NEAFC	North East Atlantic Fisheries Commission
NGO	Non-Governmental Organisation
OSPAR	Convention for the Protection of the Marine Environment of the North East Atlantic
PSSA	Particularly Sensitive Sea Area
RFMO	Regional Fisheries Management Organisation
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SEA	Strategic Environmental Assessment
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNFSA	United Nations Fish Stocks Agreement
UNGA	United Nations General Assembly
VME	Vulnerable Marine Ecosystem
WWF	Worldwide Fund for Nature

EXECUTIVE SUMMARY

The aim of the international seminar “Towards a legal framework for the creation and management of cross-sectoral marine protected areas in areas beyond national jurisdiction” held in Boulogne-sur-Mer (France) from 19 to 21 September 2011 was to develop a legal scenario analysis to catalyse critical thinking on the aspects of international law and governance needed to accelerate the establishment and management of MPAs in ABNJ.

To this end, foresight methodologies were used in order to stimulate discussions on the pathways which might be desirable to ensure an efficient governance of marine biodiversity in ABNJ. Four scenarios were prepared in advance by the organisers, all of them having 2030 as a time horizon. They were introduced to the participants, who then analysed, challenged and modified them. As it was not the aim of the seminar to validate one pre-conceived scenario, all of them were designed to be coherent, plausible and salient. The scenarios presented in this report are those that came out of the seminar as a result of exchanges.

“The regional scenario” or scenario 1 is based on the assumption that by 2030, in the absence of an overarching global agreement on marine biodiversity in ABNJ, the legal framework for the creation and management of MPAs in ABNJ is found in the existing instruments. Renegotiations of regional agreements or of regional oceans management organisations (which combine the functions of an RFMO and of a regional seas convention) took place before 2030 and it is within this framework that MPAs are designated and that management measures are adopted. For the regions of the world where no regional agreement or regional oceans management organisation exist, regional initiatives or coalitions are formed and seek the adoption of management measures through competent global or regional sectoral organisations.

“The UNCLOS implementing agreement scenario” or scenario 2 is based on the assumption that by 2030 an implementing agreement to UNCLOS on the conservation of marine biodiversity in ABNJ has been adopted. The legal basis for the adoption of this implementing agreement is found in Part XII of UNCLOS. In this scenario, the MPAs are designated and managed at the regional level by the competent authorities. The governing body of the implementing agreement has the possibility to include these MPAs in an international list if they meet certain criteria. This governing body also oversees the implementation of the agreement.

“The CBD additional protocol scenario” or scenario 3 is based on the assumption that by 2030 States have adopted an additional protocol to the CBD on the establishment and management of MPAs in ABNJ. The legal basis for the adoption of this additional protocol is found in article 5 of the CBD. In this scenario, MPAs are designated and managed at the regional level by competent authorities. The Conference of the Parties of the additional protocol has the possibility to include these MPAs in an international list if they meet certain criteria. The Conference of the Parties also oversees the implementation of the protocol.

“The precautionary scenario” or scenario 4 was not discussed during the seminar but is the result of post-seminar exchanges among some participants. It is based on the assumption that, before 2030, threats to marine biodiversity became so important that they required a paradigm shift and justified the adoption of a strong multilateral agreement on the protection of biodiversity in ABNJ. This agreement forbids all human activities in ABNJ unless they are expressly authorised *via* a decision taken by the relevant organisations. Parts of the oceans where activities are authorised are named “economic activity zones”. The precautionary principle and the “zero biodiversity loss principle” are strictly applied.

In the second phase of the seminar, participants compared the ability of the first three scenarios to deliver relevant environmental protection and equity. A set of criteria was identified, which included: capacity to identify an MPA; effectiveness in establishing networks of MPAs; reactivity; simplicity of the procedures to establish and manage MPAs; enforcement and sanctions, including MCS; compliance and dispute settlement; stakeholder inclusiveness; cross-sectoral coordination; reporting; consistency across regions; transparency; simplicity of governance; equity between countries; ecosystem and precautionary approaches.

The third phase of the seminar was devoted to an analysis of the feasibility of the first three scenarios. For the regional scenario, one of the conditions for success might be the extension of the mandate of organisations that do not currently have one in ABNJ. The consistency of data used to designate MPAs is a crucial issue, as there is currently no overarching framework which deals with it. The governance fragmentation might also lead to discrepancies between regions. Finally, the impact of future success or failure of the OSPAR model on this scenario was analysed.

The analysis of the feasibility of the UNCLOS implementing agreement scenario was mainly focused on the negotiating process and on its implementation. Participants emphasised the need for a clear and strong mandate for the negotiations. The position of major players also needs to be better understood. Then, if the negotiations are successful, the issue of the ratification of the implementing

agreement and of its implementation should not be underestimated. It has been suggested that provisional application might avoid delays and that several lessons can be learned from the implementation of the 1995 UNFSA.

The analysis of the feasibility of the CBD additional protocol scenario focuses on the conditions necessary for the adoption of this instrument. It underlines that an additional protocol to the CBD should not be presented as a “Plan B” in case of failure of negotiations under UNCLOS but as a realistic political choice. To be successful, it must overcome the view of some in the international community that UNCLOS prevails over the CBD.

The conclusion of the report is devoted to the presentation of some general observations which can be drawn from the discussions held during the seminar. These observations underline among others the importance of the CBD and of the UNGA in the future processes for the establishment and management of MPAs in ABNJ; the need for cooperation among global and regional sectoral organisations as a key to success in all the scenarios; the importance of preparing future negotiations by analysing the position of key players and by establishing a clear mandate for the negotiations of a multilateral agreement on marine biodiversity in ABNJ. The need to act at the three levels (UNCLOS, CBD and regional) was also highlighted and led to the conclusion that it will be of utmost importance to keep ready over the years to intervene in those different arenas.

1. INTRODUCTION

1.1. Context

Marine areas beyond national jurisdiction (hereinafter ABNJ) cover around half of the planet's surface (the high seas alone cover 64% of the surface of oceans and seas). They are also the least known and least protected areas on Earth. In recent years, the exponential use of ABNJ and their resources and growing human pressures have subjected them to a multiplicity of threats: overexploitation of fish stocks, illegal, unreported and unregulated (IUU) fishing, alteration of deep-water habitats due to destructive fishing practices, oil pollution, introduction of invasive alien species, noise pollution, climate change and acidification of the oceans and emerging threats linked to deep-sea mining and potentially bioprospecting.

In this context, marine protected areas (MPAs) are seen as an important tool to protect marine biodiversity by providing a higher level of protection than in surrounding areas. The term "MPA" can cover a wide variety of situations¹. MPAs can be sectoral (e.g. fishing closure) or multi-sectoral, open or closed to extractive activities. This report focuses on multi-sectoral MPAs: MPAs that aim to regulate or manage a range of uses in the area protected, with the protection of biodiversity as a primary objective. Therefore, and unless otherwise specified, the term "MPA" used in this document should be understood as "multi-sectoral MPA".

1. The International Union for Conservation of Nature (IUCN) has defined six categories of protected areas, based on their management system: 1. Strict nature reserve or wilderness area; 2. National park; 3. National monument or features; 4. Habitat/Species management area; 5. Protected landscape/seascape; 6. Protected area with sustainable use of natural resources.

As of today, establishing an MPA in ABNJ remains a challenge. Scattered initiatives are being taken at the regional level, while under the auspices of the United Nations General Assembly (UNGA) the international community is exploring how to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ effectively allows to tackle the challenge².

1.2. Objectives and rationale

The aim of the seminar held in Boulogne-sur-Mer (France) from 19 to 21 September 2011 was to develop a legal scenario analysis to catalyse critical thinking on those aspects of international law and governance needed to accelerate the establishment and management of MPAs in ABNJ. The partner organisations convening the seminar sought a structured analysis of a set of options that could be plausibly foreseen in the future.

More specifically, the objective was three-fold:

- To conduct a legal analysis of possible options to establish and manage MPAs in ABNJ;
- To explore political conditions / pathways that would enable each legal option to be realised;
- To adopt specific recommendations that could be introduced to international fora by the organisers – and by participants who wish to do so.

"Foresight", "future studies" or "scenario analysis" are all different names for a common approach towards studying the long term future. Since their debuts after World War II, foresight methodologies have been used in a wide variety of arenas and by many different actors, ranging from multinational

2. For a detailed presentation of the regional and global initiatives, see the background document prepared for the seminar: E. Druel, (2011), *Marine Protected Areas in Areas Beyond National Jurisdiction: the state of play*, IDDRI, Working Paper N° 07/11.

companies to public agencies. Since the 1990s, they have been increasingly used in the sustainable development realm, with, for example, the analysis of different climate change scenarios. Foresight methodologies were also applied in the Millennium Ecosystem Assessment (2005). Environmental foresights are applied to, *inter alia*: consider what the world could look like if current trends were maintained, or if specific changes were brought to the system; facilitate debates about national or international policies; determine an organisation's strategy; identify priorities for research. Even if the subjects studied and the objectives of the scenario analysis are varied, the concern for strategic action is at the heart of foresight methodologies.

Foresight methodologies are applied in this instance to the governance of marine biodiversity in ABNJ and more specifically to the establishment and management of MPAs in those areas. This issue is currently debated in many forums, seminars and workshops by a well-established community of experts which share an in-depth knowledge and understanding of the threats which are affecting marine biodiversity in ABNJ. From a legal perspective, several potentially positive outcomes are starting to emerge. However, progress could be slowed by a variety of constraints including the political and economic costs of change, the heaviness of international negotiations, or a reluctance to develop new international agreements should existing ones be deemed not sufficient. In such a context, foresight methodologies are useful in helping stakeholders – at least those who promote change – develop strong, long-term and coordinated strategies or roadmaps to stimulate and influence international and national efforts towards stronger governance of biodiversity in ABNJ. This is accomplished by:

- Being creative, i.e. thinking “out of the box”;
- Talking about change without stakeholders censoring themselves on existing governance frameworks or transformations of the context;
- Disconnecting discussions from today's constraints;
- Clarifying and making explicit each stakeholder's assumptions about the future;
- Anticipating consequences of actions, without necessarily having to agree on the strategy – therefore without “negotiating” solutions;
- Testing what may be seen as ideal today in face of plausible futures.

Scenarios are used to appreciate that more pathways than we think may be desirable: they open room for manoeuvre that may not be obvious otherwise.

A scenario analysis³ on this topic had already been conducted in 2008 by IUCN, which was mainly geared towards planning possible actions and measures along a range of possible ambitions, from a minimalist scenario to the most desirable one. The aim of the exercise carried out during the Boulogne-sur-Mer seminar was different. It was to help each actor build its own strategy, based on different possible scenarios all potentially desirable, and to possibly make new coalitions when interests are unexpectedly convergent.

1.3. Methodology

In order to design coherent, plausible and – most importantly – salient scenarios, 20 high level experts of the law of the sea, oceans governance and biodiversity conservation (see list in annex) were invited in their personal capacity to participate. The Chatham House Rule was applied⁴.

The four scenarios introduced in Boulogne-sur-Mer had been prepared in advance by the organisers. They were analysed, challenged and modified during the course of the seminar. The methodology used emphasised that there was no obligation to reach a consensus on one preferred scenario. The scenarios were only designed to provide potential arrangements of “building blocks” or “variants”. None of them was selected for implementation; it was not the aim of the seminar to validate one pre-conceived scenario.

Section 2 of this report provides a description of the four scenarios as they were refined during the seminar. Section 3 analyses the potential efficacy, performance and desirability of three of them. Section 4 summarises the feasibility of each. Section 5 concludes on lessons learnt for collective or individual strategies.

2. SCENARIOS

2.1. Scenario mechanics

During the first sessions of the seminar, the four initial scenarios were presented, analysed and

3. K.M. Gjerde et al. (2008), *Options for Addressing Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*. IUCN, Gland, Switzerland.

4. <http://www.chathamhouse.org/about-us/chathamhouse-rule>: “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speakers nor that of any other participant, may be revealed”.

refined by the participants. Two of the initial scenarios (“The implementing agreement with a regional governance scenario” and “The implementing agreement with a global governance scenario”) were combined into one. The group agreed to develop two variants for step 2 of this scenario and a third one was added following post-seminar exchanges among some seminar participants. The “regional scenario” and the “Convention on Biological Diversity (CBD) additional protocol scenario” were maintained but substantially modified. It was also agreed there was a need for a more precautionary – though still plausible, coherent and salient – alternative, in order to maintain in the discussion the possibility that more radical changes might occur. This fourth scenario, the “precautionary” one, based *inter alia* on the legal framework put in place in the Antarctic continent *via* the Antarctic Treaty and the Madrid Protocol, has a different status since its development was the outcome of post-seminar exchanges among some seminar participants. It presents, by contrast, a more encompassing approach⁵.

The time horizon for all scenarios is 2030. It is far enough in the future to imagine that the world situation might be very different from what it is now (for example to imagine that long international negotiations have been launched and concluded) but also close enough to be influenced by action that may be taken now. These scenarios are not precise about what would the environmental context be by 2030 and do not speculate about the nature and level of threats to marine biodiversity in ABNJ by this time (except scenario 4, out of a specific necessity). The scenarios only describe a possible future legal framework to create and manage MPAs in ABNJ.

All the scenarios are divided into four steps, which serve to assess their internal and external coherence:

Step 1: What is the political, legal and/or institutional basis for the establishment and management of an MPA in ABNJ?

5. In the course of the seminar, other scenarios were also suggested but discarded because they were not salient enough. One of them was the “all to the States” scenario, in which the high seas would disappear and be replaced by an extended Exclusive Economic Zone (EEZ). In this scenario, by 2030, States are responsible for the protection of marine biodiversity in the former high seas. Another suggestion was the “all to the markets” scenario. In this case, States give to the markets the power to regulate the different uses of marine biodiversity in ABNJ. For example, they give to the private sector the power to regulate the exploitation of fish stocks or of marine genetic resources. Another option which was studied was the possibility to adopt a *sui generis* multilateral agreement, which would build upon the provisions of UNCLOS and of the CBD.

Step 2: What kind of process supports the decision to establish or to list an area as “MPA in ABNJ”?

Step 3: Once the MPA is established, how are management measures adopted?

Step 4: How is effective implementation of these measures ensured (including monitoring, control and surveillance - MCS)?

For each step, several variants exist. Some of them are listed in figure 1, but this list does not intend to be exhaustive. Within Step 2 and Step 3, the variants are not exclusive of each other and can be combined together.

Step 1: Political, legal and/or institutional basis for the establishment and management of an MPA in ABNJ

The variants for this step include *inter alia*:

- The application of existing instruments and mandates (and their evolution) in the absence of an overarching global agreement;
- The adoption of an implementing agreement to the United Nations Conventions on the Law of the Sea (UNCLOS), with several variants related to the content of this agreement;
- The adoption of an additional protocol to the CBD, with several variants related to the content of this protocol;
- The adoption of a multilateral agreement on biodiversity in ABNJ, with several variants related to the content of this agreement.

Step 2: Process to create or to list an area as MPA in ABNJ

The variants for this step include *inter alia*, a process supported by:

- Governing bodies of the regional seas conventions, which then decide to pursue more comprehensive protection through other competent authorities;
- Relevant RFMOs which then decide to pursue more comprehensive protection through other competent authorities;
- An “integrated regional oceans management organisation” or regional agreement that combines the functions of both a regional sea convention and an RFMO;
- An alliance or a coalition of States and other stakeholders, with the intention of working through global and regional conventions and organisations: regional seas conventions, the United Nations Food and Agriculture Organisation (FAO), the International Maritime Organisation (IMO), the International Seabed Authority (ISA), RFMOs, etc...;

- The Conference of the Parties to an implementing agreement to UNCLOS or of an additional protocol to the CBD;
- An existing international body with a mandate extended to the establishment of MPAs in ABNJ (for example, ISA);
- A new international body created to supervise the establishment and management of MPAs in ABNJ.

Step 3: Adoption of management measures

The variants for this step include *inter alia*, adoption of management measures for MPAs in ABNJ by:

- The governing bodies of the regional seas conventions for activities which fall within their mandate;
- RFMOs for activities related to fisheries;
- An “integrated regional oceans management organisation” or regional agreement which combines the functions of a regional seas convention and a RFMO and can establish regional management councils for the areas it has designated as MPAs;
- Other competent regional and sectoral organisations for activities which do not fall within the mandate of RFMOs, regional seas conventions, regional agreements or integrated regional oceans management organisations;
- The governing body to an implementing agreement to UNCLOS or that of an additional protocol to the CBD;
- A global body with competences extended to the management of MPAs in ABNJ (for example, ISA);
- A new global body created to supervise the establishment and management of MPAs in ABNJ.

Step 4: Implementation of management measures

The variants for this step include *inter alia*:

- Implementation at the regional level by the relevant body(ies) supporting the process;
- Coordination of the implementation by a global body with competences for or extended to the management of marine biodiversity.

It should be noted that in some cases, steps 2, 3 and 4 will not occur in a chronological sequence. The formal declaration of an MPA is unlikely to occur until the management arrangements for the proposed MPA have been negotiated. Such management arrangements will include, but not be limited to, agreed objectives for the MPA conservation values to be protected, baseline descriptors, spatial coordinates, guidelines and rules for different uses, monitoring and review arrangements (research and monitoring plans), and administrative

arrangements, all of which may be detailed in a single or series of related conservation measures that describe the MPA. In many cases, it is only after the management arrangements have been negotiated and agreed by stakeholders that a decision to formally establish an MPA will be possible.

The following graph shows that with the diversity of possible variants in each step, a great multiplicity of combinations would be possible. Only four of these combinations were chosen and are presented here, because of their consistency and their relevance for the international debate. Each colour arrow shows the combination of variants corresponding to one scenario.

2.2. Scenario 1: The regional scenario

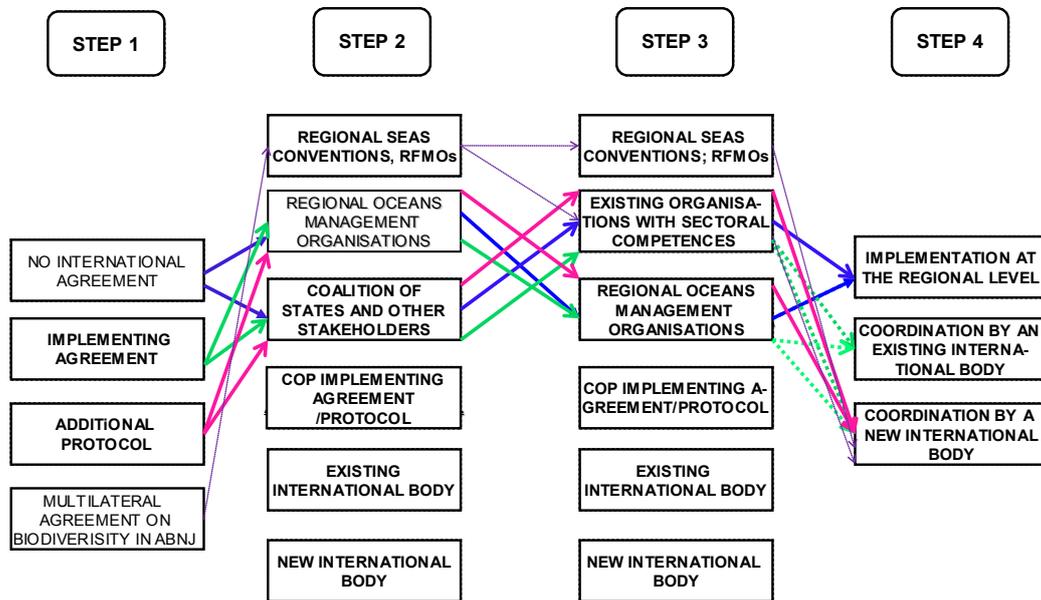
The assumption: We are in 2030. The process launched in 2006 at the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ Working Group) led to the conclusion that the improved implementation of existing instruments would be sufficient to ensure the conservation and sustainable use of marine biodiversity in ABNJ and that there was no need for a specific multilateral agreement. As a result, the emphasis was put on the regional level and all regions were encouraged to make the best use of available instruments and inherent powers.

Step 1: Political, legal and/or institutional basis for the establishment and management of an MPA in ABNJ

The legal basis is the pre-existing duties under UNCLOS, the CBD, the United Nations Fish Stocks Agreement (UNFSA) and other legally and non-legally binding instruments for the protection and preservation of the marine environment and conservation of marine resources and biodiversity in ABNJ. The specific legal competencies of various organisations for MPA establishment and management may vary depending on their constitutive legal instruments and inherent powers.

For example, in the North-East Atlantic, it is imagined that a renegotiation concerning existing instruments took place in the early 2020s and led to the conclusion of a regional agreement which includes *inter alia* the former North East Atlantic Fisheries Commission (NEAFC) and the former Commission for the Protection of the Marine Environment of the North East Atlantic (OSPAR). This regional agreement is based on modern principles of ocean governance, such as the ecosystem-based approach, integrated management and the precautionary approach.

Figure 1. Combination of variants for the four scenarios



Blue: Scenario 1 or “regional scenario”
 Green: Scenario 2 or “UNCLOS implementing agreement scenario”
 Pink: Scenario 3 or “CBD additional protocol scenario”
 Violet: Scenario 4 or “precautionary scenario”

Renegotiations of regional agreements took place and are still taking place in other parts of the world where regional seas conventions and RFMOs exist. If the original mandates of the regional seas conventions and RFMOs do not include the authority to regulate activities in ABNJ, it is extended, so that the legal competence for managing activities (including the designation of MPAs) in ABNJ is clear. These regional agreements or regional oceans management organisations can bind members of the regional organisations, but not other States or members of international organisations such as IMO or ISA. To address this, since the 2010s, regional organisations, pioneered by OSPAR, have initiated “collective arrangements”, building on bilateral memoranda of understanding between regional and global organisations.

However, not all the ABNJ are covered by such regional agreements and it has not been possible to extend to the ABNJ the mandate of the relevant regional organisations. In some of these regions (but not all), a complementary model is used, based on the Sargasso Sea Alliance experience, an initiative which was initiated in the early 2010s. The Alliance was a partnership, led by Bermuda (an overseas territory of the United Kingdom), of governmental, intergovernmental and non-governmental bodies with an *ad hoc* secretariat/co-ordinating unit. The coordinating unit enlisted the support

of coastal States (such as what has been done previously with the Titanic agreement) through the signature of partnership agreements. This cooperation between coastal States was also formalised through an agreement to control the activities of flag vessels and nationals of the States parties. The Alliance developed the scientific evidence to support designation of the Sargasso Sea as an MPA and used the competent authorities which have sectoral mandates (IMO, ISA, the International Commission for the Conservation of Atlantic Tuna - ICCAT ...) to enact protection measures. It attempted to do this in some form of synchronised/co-ordinated way through its coastal States members. As for the regional agreement, this regional coalition has no power to adopt protective measures applicable to non-members. Since then, this experience has been repeated in other parts of the world.

Step 2: Process to create or to list an area as MPA in ABNJ

During its regional workshops carried out at the beginning of the 2010s, the CBD identified a large number of EBSAs which now serve as a scientific basis for the establishment of some MPAs in ABNJ. The UNGA also adopted a resolution on the protection of EBSAs and Vulnerable Marine Ecosystems (VMEs), inspired by Resolution 61/105 of 8

December 2006 which addressed the protection of VMEs. This resolution calls on States to work individually and cooperatively through existing organisations to manage or to protect EBSAs in order to prevent significant adverse impacts, taking into account the precautionary and the ecosystem based approaches.

EBSAs and VMEs that become priority candidates for designation as MPAs are those: (i) that would benefit from more proactive and comprehensive management; (ii) that provide important components for a representative network of MPAs; or (iii) that are identified as being subject to higher levels of human pressures and related threats. This reflects CBD guidance for the design of representative MPA networks adopted in 2008.

It should also be noted that, while the process to establish MPAs in ABNJ may be initiated by fully documented ecologically and biologically significant areas (EBSAs), there are other processes, including processes supported by regional agreements, which may initiate the establishment of an MPA.

Within the regional agreements (when they exist), regional management councils have been institutionalised. The powers of the regional management councils include the authority to designate areas as MPAs in ABNJ and to establish MPA networks. Decision to designate an area as MPA is based on the advice of the CBD, of a regional scientific advisory body or on proposals from States and NGOs.

For the complementary models (based on the Sargasso Sea example), the coalition may collectively decide to designate the area as an MPA but may also seek international recognition of the area as an EBSA through the CBD, and its eventual endorsement as an MPA through the UNGA.

Step 3: Adoption of management measures

The adoption of management measures is coordinated through the regional management councils within the regional agreements or through the *ad hoc* structures set up in the complementary models.

The regional management councils are made up of States parties to the regional agreements or regional oceans management organisations. Attending as observers are representatives of global organisations having sectoral competences in the region (e.g. IMO, ISA), scientific (Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organisation – IOC-UNESCO) or conservation mandates (e.g. The United Nations Environment Programme (UNEP), the Convention on Migratory Species (CMS), the CBD), as well as stakeholders

such as scientists, representatives from Non-Governmental Organisations (NGOs) and from the private sector.

The members of the regional management council decide on management objectives for the MPAs, develop a management plan for achieving those objectives, and adopt or coordinate the adoption of the necessary conservation and management measures. The regional management council generally has the power to regulate any activity other than those that are regulated at the global level (i.e. shipping, seabed mining) or subject to sovereign immunity (i.e. military activities). For the MPA this would include power: to regulate fishing, marine scientific research, bioprospecting, waste dumping and any other unregulated activity; to require more rigorous Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA); and to set higher environmental quality objectives.

For the complementary models, the coalition may similarly agree on management objectives, develop a management plan, and agree on specific protective measures; however these would only be applicable to States members of the coalition. To be regionally or globally applicable, the States members would need to seek and obtain a combination of sectoral measures through the competent organisations: IMO for Special Areas or Particularly Sensitive Seas Areas (PSSAs), RFMOs for fisheries closures, ISA for preservation reference zones or areas of particular environmental interest... The coalition would coordinate the pursuit of such measures with one or several States playing the role of “champions” to promote the adoption of these measures in the various relevant fora.

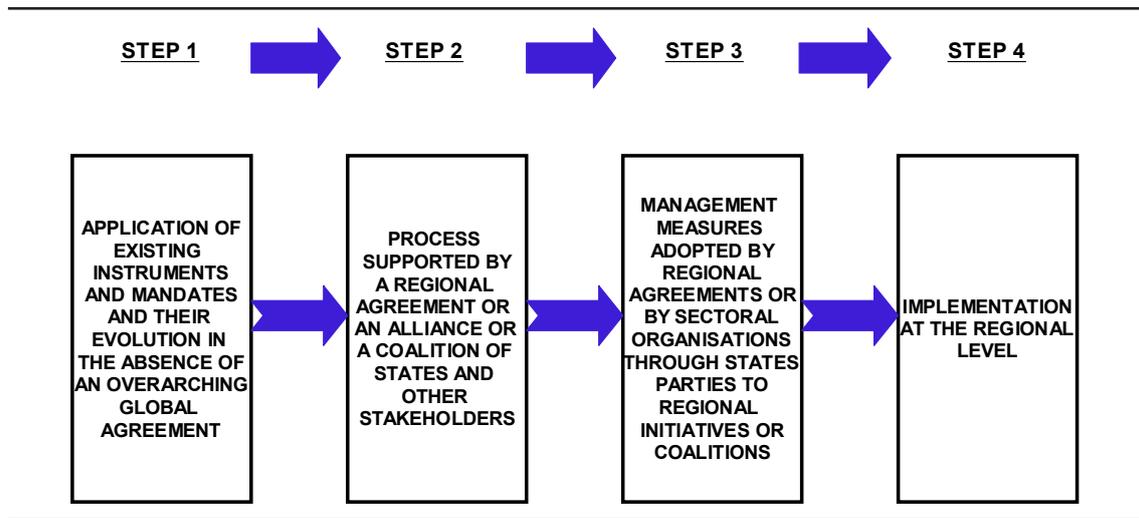
Step 4: Implementation of management measures (including MCS)

The implementation of management measures is undertaken at the regional level, with no international coordination mechanism. In the end, States are still responsible for the implementation of the measures taken by all the organisations, global or regional. The jurisdiction and control they exercise over vessels flying their flag and over their nationals to ensure compliance with and enforce the measures remain within their competence.

Existing regional mechanisms for monitoring, control and surveillance for fishing, shipping and seabed mining are used to enhance compliance with specific protective measures adopted by the relevant RFMOs, ISA or IMO.

The issue of third States still remains an important one. Regional agreements and complementary models do not bind third States if they do not consent to be bound by them or to cooperate with

Figure 2. The regional initiatives scenario



them. Efforts have been made to address this problem: it is possible to accede to regional agreements even if the State concerned is not part of the region or a coastal State, or to obtain the status of cooperating non-contracting party. States parties to regional agreements have also agreed to encourage compliance, consistent with international law, and to guarantee that no actor engages in any activity contrary to the principles or purposes of the agreement. A system of black lists has also been adopted, for vessels and for non cooperating States, based on the one already existing in RFMOs for IUU fishing. But several free riders remain insensitive to all these efforts.

The regional system has also unfortunately led to the development of a dual system. In the most developed parts of the world, States have technical and financial capacities to ensure the effective management of MPAs in ABNJ, including through the development of sophisticated MCS mechanisms. They exhausted most of their natural resources a long time ago and polluted their seas well before other regions of the world, but have by now established a deterrent and efficient compliance and enforcement system. As a result, an incentive has been created for polluters or illegal fishers to move into areas managed under a regional system which does not benefit from an effective MCS system and from effective enforcement measures. Notwithstanding many efforts over the past years to support capacity-building and technology transfer to developing States, despite the fight against corruption and the development of Port State control tools - less expensive and sometimes more efficient than control at sea - many regions still lack the technical and financial resources to manage the MPAs they designated.

The system of dispute settlement has not evolved since the 2010s.

2.3. Scenario 2: The UNCLOS implementing agreement scenario

The assumption: We are in 2030. A consensus has been reached between countries for the conclusion of an implementing agreement to UNCLOS. This implementing agreement has been adopted as a “package”, covering all issues related to biodiversity in ABNJ (including marine genetic resources and a regime of access and benefit-sharing, marine scientific research, area-based management tools including MPAs, EIA...). General objectives include effective implementation of existing instruments, integrated ecosystem-based management, precaution, transparency and science-based decision-making. The agreement also supports the establishment of regional agreements or regional oceans management organisations. It is open to all States. An article of the implementing agreement also provided for its provisional application, starting immediately upon its adoption. Since then, the vast majority of States ratified or acceded to it.

Conscious of the fact that management of MPAs at the global level would have been quite challenging, States have opted for a dual approach. General principles and procedures on the conservation and management of the marine biodiversity are developed in the global level agreement. Area-based management tools, including designation and management of MPAs as well as efficient compliance and enforcement mechanisms are managed at the regional level. Cooperation, coordination and compliance are monitored at

the global level to promote consistent progress amongst all regions.

Step 1: Political, legal and/or institutional basis for the establishment and management of an MPA in ABNJ

The legal basis for the development and adoption of the implementing agreement is found in UNCLOS Part XII. This includes (i) the general obligation to protect and preserve the marine environment under UNCLOS Article 192⁶; (ii) the duty to protect rare and fragile ecosystems as well as the habitat of depleted, endangered and threatened species and other forms of marine life in Article 194, paragraph 5⁷; (iii) the duty to cooperate under Article 197 of UNCLOS⁸ and under customary international law.

The legal mandate to establish and manage an MPA is found in the UNCLOS implementing agreement itself. It contains provisions which allow the establishment of MPAs in ABNJ according to a procedure detailed in the following steps. It also reinforces the principles which govern management of activities in ABNJ, including those that may affect an MPA (such as the ecosystem-based approach and integrated management and precautionary principles).

Step 2: Process to create or to list an area as MPA in ABNJ

During its regional workshops carried out at the beginning of the 2010s, the CBD identified a large number of EBSAs. They now serve as a scientific basis for the establishment of MPAs in ABNJ, along with the VMEs identified through the application of Resolution 61/105 and the FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas. Other globally agreed criteria (such as the ones adopted in regional agreements or regional oceans management organisations) are also used to identify areas requiring protection.

In a first stage, an MPA is identified and

designated at the regional level in the framework of a regional agreement or by a regional coalition (complementary model based on the Sargasso Sea example) or other regional processes. It is then submitted to the governing body of the UNCLOS implementing agreement. Proposals may also be submitted directly to the governing body. In all instances it is accompanied by a proposed management plan. A committee or an advisory body to the governing body is responsible for reviewing the proposal and the accompanying management plan and for making recommendations to the governing body based on criteria defined in the implementing agreement.

If the proposed MPA meets the defined criteria (e.g. global significance and/or representativeness) and the proposed management plan is determined to be appropriate, the MPA may be included in a list by the governing body in charge of the implementation of the agreement (see the three variants below). This mechanism has been inspired by the mechanism which already existed in the Barcelona Convention framework for the inscription of protected areas in the list of specially protected areas of Mediterranean importance. The listing of the MPA and its management plan makes compliance with the management measures adopted legally binding for all the contracting parties to the implementing agreement. States Parties to the agreement but outside the region would have the same obligations to observe the management measures for the MPA as those States Parties from the region.

Sub-scenario a): There has been much debate during the negotiations on which international body should be in charge of overseeing the implementation of the agreement. Many States argued that the mandate of the ISA should be extended to include marine biodiversity of the seabed and its subsoil beyond the limits of national jurisdiction, namely the Area, as well as the water column above, namely the high seas, in addition to management of activities related to seabed mineral resources. It was argued that deep sea biodiversity and deep seabed minerals are closely associated with each other and the water column above. It was therefore decided to extend the mandate of ISA to the conservation and sustainable use of marine genetic resources and to the conservation and management of MPAs in both the high seas and the Area.

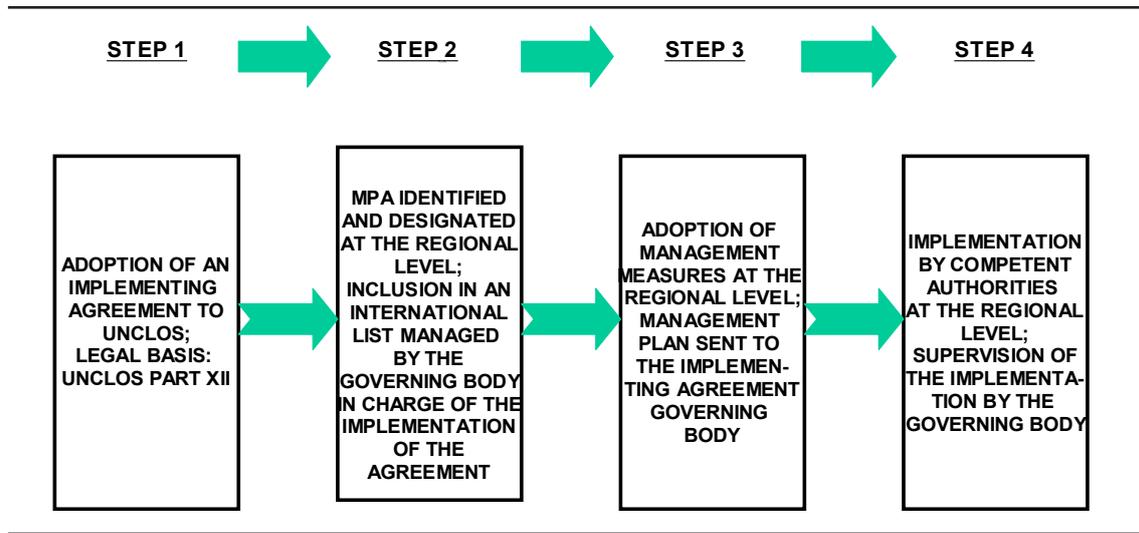
Sub-scenario b): There has been much debate during the negotiations on which international body should be in charge of overseeing the implementation of the agreement, including the

6. Article 192 of UNCLOS: “States have the obligation to protect and preserve the marine environment”.

7. Article 194 §5 of UNCLOS: “The measures taken in accordance with this part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

8. Article 197 of UNCLOS: “States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”

Figure 3. The UNCLOS implementing agreement scenario



establishment of MPAs. Countries finally opted for creating a new international body.

This new international body has a governing body (e.g. an Assembly of States Parties or Conference of the Parties), in which participation is almost universal. It also has a Council and permanent advisory bodies on science and technology; legal and technical issues; implementation and enforcement. A financial mechanism has been established to cover the costs of management, compliance and enforcement.

Under sub-scenarios a and b, the international body manages a default mechanism to create MPAs for the parts of ABNJ which do not benefit from a regional agreement or from a regional coalition. It also manages the list of internationally recognised MPAs, and reviews their management plans every five years. With the competences given by the implementing agreement, it has established an effective compliance mechanism to encourage implementation as well as a global level MCS system. It centralises all the information on MCS in these remote areas, working in close cooperation with competent international organisations and especially with RFMOs.

Sub-scenario c): no new international body is established, but a meeting of a conference of the parties serviced by a permanent secretariat takes place on a regular basis (akin to the CBD structure). Most of the work is done through regional agreements or regional oceans management organisations established via the UNCLOS implementing agreement. The Conference of the Parties oversees an effective compliance mechanism, reviews the management plans of the MPAs included in the

international list and helps to ensure the coordination of monitoring, control and surveillance systems.

Step 3: Adoption of management measures

Management plans and associated conservation and management measures are discussed at the regional level by the relevant regional organisations (regional agreements or regional oceans management organisations), with the participation as observers of global organisations having sectoral competences in the region (e.g. IMO, ISA), scientific (IOC-UNESCO) or conservation interests (e.g. UNEP, CMS, CBD) as well as stakeholders such as scientists, representatives from NGOs and from the private sector. Specific measures outside the competence of the regional organisations are submitted to the competent international organisation (IMO or ISA for example).

When complementary models such as the Sargasso Sea Alliance are used, discussions on the management measures are taking place within the coalition. States parties to this coalition are then acting through the competent international organisations for the adoption of these measures.

The UNCLOS implementing agreement includes a specific mandate for cooperation and coordination that ensures that all States and organisations are working towards the explicit goals of conservation and sustainable use, including regionally representative and ecologically significant networks of MPAs.

Step 4: Implementation of management measures (including MCS)

The implementation of the management measures has raised several issues amongst the international

community. The first one was financing. At the beginning, States were quite reluctant to provide financial resources to the global and regional bodies in charge of overseeing the implementation of the agreement. But the situation began to improve at the end of the 2020s with the increased attention given to oceans and their resources, following several major though localised ecological crises. An important effort has also been undertaken to ensure that principles of transparency and equity were respected for the financing of every MPA.

Improvements have been made to the reporting system of the CBD. Based on article 4 paragraph b (Jurisdictional scope), article 5 (Co-operation) and article 26 (Reports) of the Convention, its contracting parties now have the obligation to report regularly on the measures they are taking to implement the management measures decided by the regional management council for the MPAs in ABNJ. The Convention's Conference of the Parties has also called for close cooperation between the Convention and the implementing agreement's governing body with respect to the conservation and sustainable use of biodiversity in ABNJ.

Concerning the system of enforcement, when an infringement is established in an MPA, it is notified to the governing body and discussed in the Council (for sub-scenarios a and b) or during the Conference of the Parties (for sub-scenario c) which can adopt recommendations asking the concerned State to control and sanction its nationals or vessels. If recommendations do not have the desired effect, the Council or the Conference of the Parties can also decide to sanction the concerned State as a 'non-compliant Party' or, for non-parties, as a "non-cooperating State". As a last resort, States can also institute proceedings before the International Tribunal for the Law of the Sea (ITLOS).

2.4. Scenario 3: The CBD additional protocol scenario

The assumption: We are in 2030. Almost twenty years ago, States decided to launch the negotiations to conclude an additional protocol to the CBD on MPAs in ABNJ. The negotiations for this protocol took several years. States first had to reach an agreement on the respective and complementary roles of the CBD and UNCLOS. They took into account for example articles 4, 5 and 22 of the CBD, the Strategic Plan for Biodiversity (2011-2020) and its Aichi targets. In addition, the CBD had undertaken an important work on marine biodiversity in ABNJ, in particular with the EBSAs, and had therefore at its disposal a large variety of scientific and technical tools, ready to be used in this context.

The legal basis for the conclusion of this additional protocol is a decision by the CBD Conference of the Parties relying in part on article 5 of the CBD: *"Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organisations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity"*⁹.

In the meantime, the CBD has also adopted instruments on EIA and Access and Benefit-Sharing (ABS) in ABNJ.

Step 1: Political, legal and/or institutional basis for the establishment and management of an MPA in ABNJ

The legal basis is found in the additional protocol itself, which expressly authorises the establishment of MPAs in ABNJ and develops guiding principles for their management such as the ecosystem approach or the precautionary principle.

Step 2: Process to create or to list an area as MPA in ABNJ

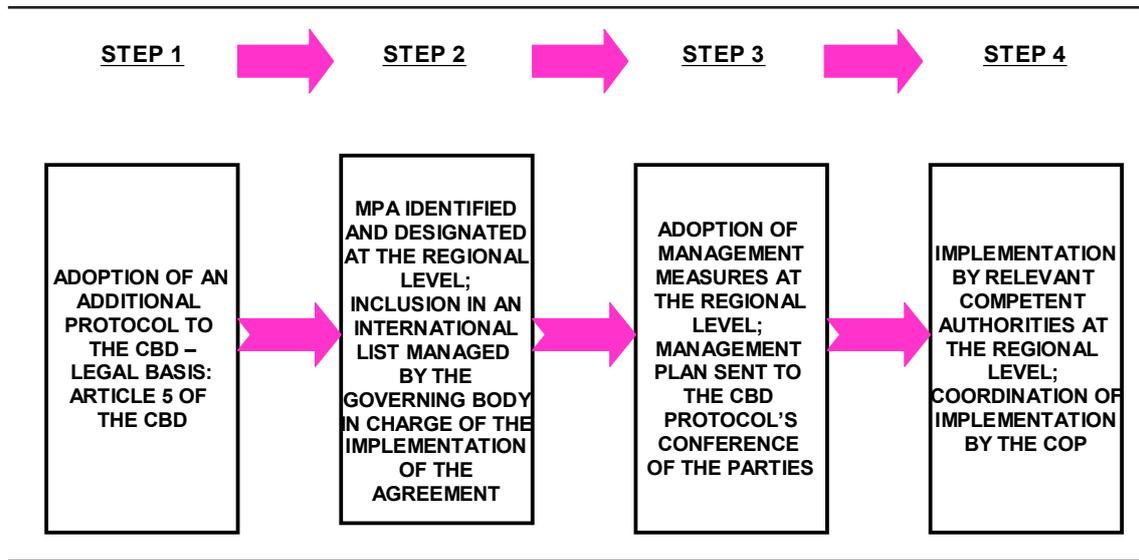
During its regional workshops carried out at the beginning of the 2010s, the CBD identified a large number of EBSAs, which now serve as a scientific basis, along with the VMEs identified through the application of Resolution 61/105 and the FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas for the establishment of MPAs in ABNJ. Other globally agreed criteria (such as the ones used in regional agreements or regional oceans management organisations) are also used to identify areas requiring protection.

In the first stage, the MPA is identified and designated at the regional level by a regional agreement or regional oceans management organisation, or by a regional coalition (complementary model based on the Sargasso Sea example), or other processes.

If the MPA and associated management plan adopted at the regional level meets certain criteria defined in the additional protocol, it is proposed to the Protocol's governing body by one or several Contracting Parties for inclusion in an international list established by the protocol. The proposal and associated management plan are reviewed by the CBD's subsidiary body on scientific, technical

9. For the conclusion of this additional protocol, States also took into account article 22 (2) of the CBD: *"Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea"*.

Figure 4. The CBD additional protocol scenario



and technological advice (SBSTTA), supplemented by an *ad hoc* experts group as necessary.

As with the UNCLOS implementing agreement, the primary advantage is that listing of the MPA and its management plan makes compliance with the management measures adopted legally binding for all the Contracting Parties to the CBD Protocol. States Parties to the Protocol but outside the region have the same obligations to observe the management measures for the MPA as those States Parties from the region.

Step 3: Adoption of management measures

As under the UNCLOS implementing agreement scenario, management plans and associated conservation and management measures are discussed at the regional level by the relevant regional organisations (regional agreements or regional oceans management organisations), with the participation as observers of global organisations having sectoral competences in the region (e.g. IMO, ISA), scientific (IOC-UNESCO) or conservation interests (e.g. UNEP, CMS, CBD) as well as stakeholders such as scientists, representatives from NGOs and from the private sector. Specific measures outside the competence of the regional organisations are submitted to the competent international organisation.

When complementary models such as the Sargasso Sea Alliance are used, discussions on the management measures are taking place within the coalition. States parties to this coalition are then acting through the competent international organisations for the adoption of these measures.

Unlike the implementing agreement, the CBD additional protocol cannot mandate cooperation

or coordination across UN bodies. Instead, the CBD additional protocol contains language to encourage all States and organisations to work towards the common goals of conservation and sustainable use of marine biodiversity in ABNJ, including regionally representative and ecologically significant networks of MPAs.

An agreed set of management objectives and associated management plan adopted at the regional level are sent to the CBD protocol's Conference of the Parties, with the request for inclusion in the international list. The Conference of the Parties can make some recommendations on this management plan if deemed necessary. Every five years the implementation of the management plan is reviewed.

Step 4: Implementation of management measures (including MCS)

Implementation remains a challenging issue. There is no centralised mechanism to supervise monitoring, control and surveillance. It is left in the hands of the global or regional sectoral organisations and in the end, in the hands of the individual Parties to the Protocol. Nevertheless, funding provided by the GEF as well as by donors to the CBD's Lifeweb Initiative does support the development and implementation of MPA management plans in regions requesting assistance.

Moreover as with other CBD protocols, this protocol established a compliance body mandated to take a range of facilitative and punitive measures with respect to contracting parties which are not fulfilling their obligations under the protocol.

The compliance body makes intensive use of the reporting system specified in the additional

protocol (based on Article 26 of the CBD: “Each Contracting Party shall, at intervals to be determined by the Conference of the Parties, present to the Conference of the Parties, reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention”). The measures imposed by the compliance body and the national reports, all of which are publicly notified, have increased pressure on Parties to comply with their obligations. In addition, a supplementary provision to the Protocol, modelled on the Nagoya Protocol, obligate contracting parties to encourage non-Parties to adhere to the Protocol and to contribute to a centralised information repository modelled on the CBD Clearing-house Mechanism.

Innovatively, the protocol also makes an explicit reference to the system of dispute settlement established by UNCLOS, and gives *inter alia* to the ITLOS jurisdiction over cases which may arise between Parties to the protocol. The legal basis for introducing this article in the additional protocol is Article 21 of Annex VI of UNCLOS: “The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction to the Tribunal”¹⁰.

2.5. Scenario 4: The precautionary scenario

The assumption: We are in 2030. In the course of the 2010s, several ecological crises led States to realise that a strong initiative was needed to protect the biodiversity in ABNJ. The collapse of important commercial fish stocks (the most resounding one being the total collapse of worldwide tuna stocks in 2018), accidents in the course of offshore oil and gas and mineral exploitation, mounting stresses and ecosystem-wide impacts from climate change and increasing ocean acidification led to major changes in diversity and productivity of marine ecosystems. Decline in vital ecosystem services severely affected the livelihoods of many coastal populations and entire

economic sectors. This led to the conclusion that the solution to protect ABNJ as the vital heart of the oceans should be radical and come from a paradigm shift.

Under the auspices of the UNGA, States decided to negotiate a multilateral agreement on biodiversity in ABNJ. This agreement makes the ABNJ “an area devoted to peace, research and biodiversity conservation” and forbids all human activities there, unless they are expressly authorised by the competent authority. The ABNJ themselves are now a sort of “gigantic MPA by default”. Human activities are only authorised in specific “economic activity zones” and managed to ensure they do not cause significant adverse impacts.

Step 1: Legal basis

The multilateral agreement clearly states that all human activities are forbidden in ABNJ unless they are expressly authorised *via* a decision taken by the relevant regional organisation or, if there is no regional organisation, by the relevant global organisation. It builds on UNCLOS, the CBD and modern principles of ocean governance such as the calls for precaution contained in the UN Fish Stocks Agreement, UNGA Resolutions 61/105 and 64/105, the Rio Declaration, and other global declarations.

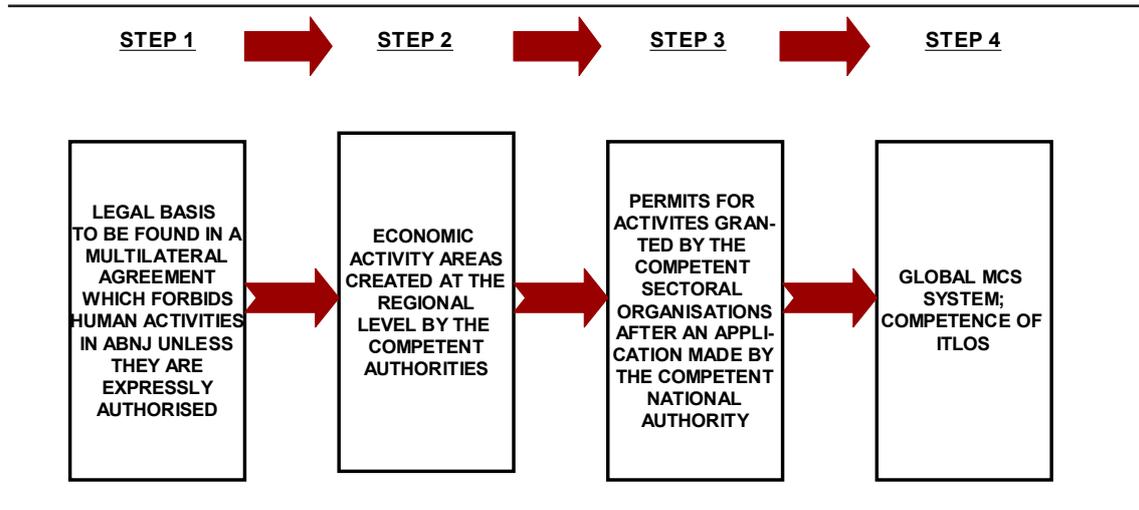
Decision to grant a permit for such activities should only be taken when a certain number of conditions have been satisfied. These conditions are based on principles enumerated in the agreement and comprise: the obligations to carry out EIAs and SEAs, to apply the ecosystem-based approach, the precautionary principle and the sustainable and equitable use of marine biodiversity, and to manage activities to prevent significant adverse impacts. Moreover, activities to be authorised have to make the case that they do not imply any more erosion of biodiversity: this “zero-loss principle” is at the heart of the new agreement as it was deemed to be an absolute requisite for the international community to finally match its long-standing biodiversity objectives.

Step 2: Process to create an economic activity zone

This decision is taken at the regional level by the relevant competent authorities, according to criteria laid down by the multilateral agreement. For example, RFMOs can authorise fishing in certain areas, IMO can authorise navigation through certain channels under strict conditions, ISA can authorise seabed mining in certain parts of the seabed and following a very stringent procedure. Regional decisions are subject to appeal to the global governing body under certain conditions.

10. This article must be read in conjunction with Article 20 (2) of Annex VI of UNCLOS: “The Tribunal shall be open to entities other than States Parties in any case [...] submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all parties on that case” and with Article 22 of the same Annex: “If all the parties to a treaty or a convention already in force and concerning the subject matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal”.

Figure 5. The precautionary scenario



Step 3: Adoption of management measures

An actor wishing to engage in activities in an economic activity zone must first carry out an EIA and/or SEA, and as a next step, apply for a permit to its competent national authority. Once this authority has agreed to deliver such a permit, it sends it for approval to the competent sectoral organisation which reviews it and decides whether to authorise the activity.

Adoption of management measures for the economic activity zones is coordinated at the regional level by the relevant regional organisations (regional agreements or regional oceans management organisations), with the participation as observers of global organisations having sectoral competences in the region (e.g. IMO, ISA), scientific (IOC-UNESCO) or conservation interests (e.g. UNEP, CMS, CBD) as well as stakeholders such as scientists, representatives from NGOs and from the private sector. Specific measures outside the competence of regional organisations are submitted to the competent international organisation.

Authorities sign an agreed management plan which expressly states the level of human pressure accepted in the area concerned (fishing effort, number of vessels in the area...). The plan is legally binding for all the contracting parties to the multilateral agreement.

The agreed management plan is sent to the COP of the multilateral agreement which can make some recommendations if deemed necessary. It is reviewed every two years.

Step 4: Implementation of management measures (including MCS)

The failure of the previous system was due *inter alia* to the lack of enforcement of flag States over their nationals and over vessels flying their flag.

Conscious of this fact, States have decided radical changes and have opted for a system of universal jurisdiction as is the case for piracy and other specified crimes (UNCLOS arts. 100, 105, 108, & 109). States have also authorised the creation of an international force with powers of monitoring, control and surveillance as well as enforcement established under the auspices of the United Nations. This international force is deployed in all regions of the world.

When vessels and/or nationals are arrested because they are found to be in contravention with the dispositions of the multilateral agreement or with an agreed management plan adopted pursuant to the agreement at the regional level, the ITLOS has the competence to judge and sanction them. In fact, the statute of ITLOS evolved through the multilateral agreement and it can now judge whether States parties are in compliance with this agreement.

3. COMPARING THE ABILITY OF CONTRASTED GOVERNANCE REGIMES TO DELIVER APPROPRIATE ENVIRONMENTAL PROTECTION AND EQUITY

During the seminar, a cross-assessment of options, consisting of an analysis of the possible performance and desirability of the first three scenarios, was conducted. One of the main results of this discussion has been to identify a specific set of criteria to assess the performance of the legal and governance scenarios: their future environmental performance could not be assessed as it depends on ecological assumptions and would

have necessitated other fields of expertise. Nevertheless, a set of criteria was developed in order to assess the capacity of each governance option and its related legal process to ensure relevant environmental protection and equity.

The set of criteria identified by the group of experts was the following:

	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Capacity to identify an MPA				
Effectiveness in establishing networks of MPAs				
Reactivity				
Simplicity of the procedures to establish and manage MPAs				
Enforcement and sanctions; MCS				
Compliance and dispute settlement				
Stakeholder inclusiveness				
Cross-sectoral coordination				
Reporting				
Consistency across regions				
Transparency				
Simplicity of governance				
Equity between countries				
Ecosystem approach				
Precautionary approach				

The decision-making process appears to be an important point to take into consideration, with criteria such as the need to take decisions based on the ecosystem and the precautionary approaches, the capacity to identify MPAs, the responsiveness of the system, the simplicity of the procedures to establish and manage MPAs, the inclusion of a variety of stakeholders, coordination across sectors, the simplicity of governance and transparency of the decision-making process. On the other hand, some points were made on the reporting systems, MCS or sanctions mechanisms. It was also underlined that the criteria of equity and consistency across regions were essential to compare the performance of each scenario.

Based on these criteria, the evaluation and comparison of desirability among the scenarios is nevertheless a subjective exercise, and the group of

experts chose not to rank the different scenarios in terms of desirability. Indeed, all scenarios have been designed to be equally desirable. But the set of criteria enables highlighting some interesting differences among options.

The main strengths of the three scenarios with a regional component are their potential capacity to adapt and respond to threats against marine biodiversity, while including stakeholders in the decision-making process. This is particularly true in Scenario 1 (“The regional scenario”), but has been also introduced into Scenarios 2 and 3 in order to benefit from the regional capacity to deliver good governance of MPAs in ABNJs. On the other hand, equity and consistency across regions also seem to be important criteria that support creation of a global coordination mechanism such as in scenarios 2 and 3.

The capacity to ensure compliance and enforcement seems also a very important feature to ensure the performance of the legal regime. Scenario 2 (“The UNCLOS implementing agreement scenario”) and scenario 3 (“The CBD additional protocol scenario”) are potentially more efficient in terms of opposability to third countries and can ensure better consistency across regions. Without an implementing agreement or an additional protocol, scenario 1 is quickly limited in its capacity to bind third countries, but it appears that enforcement might be easier at the regional level. Scenarios 2 and 3 are only efficient when complemented by strong regional governance.

The simplicity of governance also varies amongst scenarios. For example, at first glance it might seem that Scenario 3 (“The CBD additional protocol scenario”) would be potentially more complex to implement than the others, in particular because it may be more difficult to ensure good cross-sectoral coordination and “buy-in” from all the relevant sectors. This scenario would also require strong regional governance. But one of the lessons learnt from the seminar was that the CBD certainly has an important role to play in all other scenarios.

4. FEASIBILITY

This last section is devoted to the analysis and comparison of the feasibility of the first three scenarios (regional, UNCLOS implementing agreement and CBD additional protocol). Under which conditions may each scenario happen and be successful? What could be the major obstacles? The scenarios are discussed successively, with several options being considered for each of them, but with no pretention to be exhaustive.

4.1. Feasibility of the regional scenario

One of the specificities of scenario 1 is that its legal basis is already provided by existing legal agreements, including UNCLOS, at least with respect to overarching duties to protect and preserve the marine environment, including rare or fragile habitats and vulnerable species. The legal authority to regulate activities through area-based management tools such as fisheries closures or PSSAs in order to provide a higher level of protection is also found in the mandate of several global and regional sectoral organisations (e.g. RFMOs, IMO, ISA, some regional seas organisations...). In this scenario, extending the mandate of organisations that do not currently have one in ABNJ might be envisaged as a condition of feasibility. Whereas much can be accomplished through complementary models such as the Sargasso Sea Alliance, progress is dependent on other organisations having both the will and the legal mandate to adopt the necessary conservation and management measures.

In every region, the varying balance of power between actors or sectors could be a potential obstacle within and amongst regions. Some actors are stronger in some regions, and some have stronger conservation interests than others. At the same time, many of the States and stakeholders that would be involved in the negotiations would be the same, as some activities are global in nature. This could enable some consistency in progress amongst different regions. In others, particularly where issues facing one region are different from another, different sectoral stakeholders may be involved. Having to go through a diversity of regionally based negotiation processes will therefore not necessarily increase the resistance of sectoral stakeholders.

With regard to establishing MPAs, the availability and use of scientific data might be an issue. All the competent organisations might use different databases, might lack certain scientific information, might not have the same means to analyse these data. Ensuring the coherence of the data and its application will therefore be a crucial issue. Once scientific information is collected, there is also a risk that the organisations use different scientific criteria and evidentiary standards to decide whether to designate an MPA in ABNJ. In this regional scenario, no overarching framework is setting up these criteria, except possibly through development and reinforcement of CBD EBSAs criteria or harmonisation of the criteria used under various sectoral organisations (e.g., CBD EBSA criteria, FAO International Guidelines for the

Management of Deep-sea Fisheries in the High Seas, MARPOL Special Areas criteria, etc.). Linked to this important issue is the question of the limits of MPAs: without an overarching system of common global criteria, there is no scientific reason for the limits of fisheries closures, Special Areas or PSSAs or preservation reference areas to coincide.

The fragmentation also implies that States may have difficulties being consistent in the decisions they are adopting in various organisations. Existing players often stem from different ministries and have difficulties to agree on conservation issues. Equally, it means that the same State could have to comply with different rules for the designation and management of MPAs in ABNJ depending on the region of the world.

This means that progress on MPAs may vary considerably between regions. Resources will not be the same if neighbouring States are developing or developed countries. In addition, effective flag State jurisdiction and control is a challenge, with several States in all parts of the world widely known as being flags of convenience. Another problem which might arise from the diversity of actors is that States will not necessarily be Parties to all the relevant agreements. In this case, they can only be expected to implement only partially the set of measures adopted in the framework of an agreed management plan.

It should be underlined that, depending on its future evolution, the OSPAR model could have a positive and a negative impact on this scenario. A failure at OSPAR would have, for example, the potential to slow down the whole regional process. A success would probably encourage other regions to make progress on the subject. This is connected with the possibility to conclude regional agreements which will merge together different regional organisations having the same geographical area of competence (such as OSPAR and the NEAFC). This will be crucial in the current context of the global financial crisis as States will show some reluctance to duplicate their efforts in somehow redundant regional organisations. As mentioned within 2.2 (Scenario 1), OSPAR has also started to build a collective arrangement between competent organisations (regional and global) to help coordinate the efforts of competent authorities as diverse as IMO, ISA, and NEAFC. It seems obvious that establishing working dialogues in all the regions of the world should be seen as one of the conditions of feasibility. It must also be noted that NGOs (and notably WWF) were at the heart of the OSPAR initiative concerning MPAs in ABNJ: they carried out scientific studies and made important proposals. In that respect the capacity of NGOs and of the civil society at large to influence the process should

be seen as instrumental for the complete realisation of this scenario.

4.2. Feasibility of the UNCLOS implementing agreement scenario

The legal basis for scenario 2 is UNCLOS part XII, building on the model of two previous implementing agreements with respect to deep seabed mining and straddling and highly migratory fish stocks. As of today there is no consensus on the need for this implementing agreement between States in the BBNJ Working Group. Therefore, the issue of feasibility of scenario 2 is rather focused on the negotiating process, and on the ratification and implementation of this instrument.

The need for a clear and strong mandate for the negotiation of this instrument is crucial. This mandate could come from a declaration made at the United Nations Conference on Sustainable Development (“Rio+20”) which will take place in June 2012 in Rio de Janeiro, Brazil, and/or from a resolution of the UNGA. Both the declaration and the resolution could also contain a list of general principles to be included in the implementing agreement, or which should guide the negotiations. In the case of the UNGA, the resolution could be adopted following recommendations made by the BBNJ Working Group (which has a recommendatory mandate to the General Assembly).

The position of the major players during the negotiations will also be an important condition of feasibility. It remains unclear what role the possible ratification of UNCLOS by the US will have. US ratification, if it took place, could be a positive signal for the negotiations, but the process at the BBNJ Working Group in 2011 was led by the G77 & China, the European Union (EU) and other States such as New Zealand – not by the US. Conversely, the position of major emerging countries needs to be better understood as it may turn out to be an obstacle with respect to MPAs.

Once the negotiations are concluded, the issue of the ratification of the implementing agreement itself will raise a certain number of questions. As this agreement will concern the ABNJ, its effective implementation will require broad acceptance and universal participation. It means that all major players will need to ratify it, a process which might take a long time. In order to avoid excessive delays in ratification, a provisional application could be considered, which is expressly authorised by the Vienna Convention on the Law of Treaties¹¹. This

11. Article 25 of the Vienna Convention on the Law of Treaties: “1. A treaty or part of a treaty is applied provisionally pending

system has already been used for the 1994 Agreement relating to the implementation of Part XI of UNCLOS¹².

Comparisons with the UNFSA adopted in 1995 and entered into force in 2001 are also telling. This agreement has not yet gained universal participation, in part because of its provisions relating to boarding and inspection. Therefore anything related to boarding and inspection could potentially delay the entry into force of an implementing agreement and prevent universal participation to it.

Last, the difficulty to implement the agreement should not be underestimated, especially when it comes to the application of its principles and measures by existing agreements. Here again looking at lessons learnt from the implementation of the 1995 UNFSA by RFMOs and fishing States might be a good starting point. The number of Contracting Parties to this agreement is still limited, and its overarching principles such as the precautionary approach have proven to be difficult to implement in RFMOs when all members are not party to the UNFSA. On the other hand, the UNFSA reflects modern standards and criteria for performance of RFMOs that have been widely adopted as a yard stick for RFMOs performance audits.

4.3. Feasibility of the CBD additional protocol scenario

Scenario 3 has its legal basis in article 5 of the CBD and in existing instruments and customary international law. However the procedure for the designation and adoption of management measures for MPAs has not yet been elaborated. Therefore, the discussion of feasibility focuses on the adoption of this instrument.

its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is applied provisionally of its intention not to become party to the treaty”.

12. Article 7 of the Agreement states that : “If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (c) States and entities which consent to its provisional application by so notifying the depositary in writing; (d) States which accede to this Agreement”.

In order for the negotiations to be successful, an additional protocol to the CBD should not be presented as a “Plan B” in case of failure of negotiations under UNCLOS, but as a realistic political choice. For example, States in the BBNJ Working Group could conclude that, as an existing instrument whose implementation would be strengthened by the development of a new protocol under it, the CBD is the appropriate forum to adopt a comprehensive global instrument on the conservation and sustainable use of marine biodiversity in ABNJ, including provisions on MPAs.

Finally, it should be borne in mind that an important challenge to achieving this scenario is the view of some in the international community that UNCLOS prevails over the CBD. The feasibility of this scenario would therefore appear in part to depend on emphasising the complementarities of the two instruments.

5. CONCLUSION

The aim of this international seminar was to develop a legal scenario analysis to catalyse critical thinking on the aspects of international law and governance needed to accelerate the establishment and management of MPAs in ABNJ.

Four scenarios prepared in advance by the organisers were presented to the participants and then analysed, challenged and modified until they were deemed coherent, plausible and salient. The “regional”, “UNCLOS implementing agreement” and the “CBD additional protocol” scenarios are the result of these discussions. A fourth scenario, the “precautionary” one, was introduced in this report which was radical enough to show, by contrast, that the first three scenarios are actually built on a similar logic, and that it is not the only possible one.

The first three scenarios were further analysed with respect to their efficacy and to their feasibility. As the seminar did not aim to determine which scenario would be the best in 2030, the report does not, as a conclusion, recommend one of them over the others. Nevertheless, these three scenarios and the analytical framework used to assess their relative coherence, performance and feasibility provide stakeholders of the intergovernmental process(es) addressing MPAs in ABNJ with a basis to facilitate exchanges around options and to determine their own strategy.

5.1. General observations

Some general observations common to the scenarios and the process for analysing them in the future can be drawn:

1. A list of criteria was established to assess the governance performance of each of the scenarios: capacity to identify an MPA; effectiveness in establishing networks of MPAs; reactivity; simplicity of the procedures to establish and manage MPAs; enforcement, sanctions and MCS; compliance and dispute settlement; stakeholder inclusiveness; cross-sectoral coordination; reporting; consistency across regions; transparency; simplicity of governance; equity between countries; ecosystem approach; precautionary approach. This list represented a first attempt to identify key criteria and could usefully be further elaborated.
2. The CBD has an important role to play in all the scenarios. The importance of its expertise on the subject was underlined several times. Even in scenarios 1 and 2, its role in relation to EBSAs, to the establishment of targets and of a reporting system was underlined. It has also been noted that identifying an EBSA comes with a political pressure to adopt protection measures for this area, but not necessarily to establish an MPA. The process leading from the recognition of an EBSA to the establishment of an MPA still has to be defined, depending on the governance path or scenario that is followed. One could imagine a transition from EBSAs to sectoral protected areas and then to MPAs but legal instruments are still lacking.
3. The UNGA has a central role to play in all scenarios. It has consistently reaffirmed this role on the issue of marine biodiversity in ABNJ, including through Resolution 65/37A, § 161. It is currently the political forum discussing the establishment of a process “with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forwards, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea”. In all the scenarios, the UNGA would probably need to have an oversight role and may also adopt resolutions on the protection of biodiversity in ABNJ such as one granting additional protection to EBSAs and/or VMEs. More importantly, in scenarios 2 and 3, it would also need to define a strong and clear mandate for the negotiations of an implementing agreement to UNCLOS or of an additional protocol to the CBD.
4. Cooperation among global and regional sectoral organisations is essential for success in all scenarios.
5. As far as compliance is concerned, a soft international framework (review, reporting and

expertise) can immediately be useful to bring pressure on States and organisations which are not fulfilling their obligations.

6. Some procedural questions seem to be important in order to plan for action: should the mandate for the negotiation of a multilateral agreement be adopted at Rio+20 or at the UNGA? In this context, consideration should also be given to the length of the ratification process, with the possibility to use the provisional application mechanism to speed up the process.
7. Power balances and imbalances are among key barriers and opportunities for change. For instance, there are issues if the EU is the only or main “champion” of MPAs in ABNJ: it needs prior coordination between 27 member States before adopting any position, it might be slow to react and difficult to move. Other champions (to complement the action of the EU, not to substitute for it) need to be found, including States within the EU itself. Finally, resistance of vested interests of existing bodies might slow down changes.
8. Options on marine genetic resources, that can usefully be considered and discussed separately from these scenarios on MPAs, are nevertheless not neutral and will influence the range of possible options in relation to MPAs. Negotiations at the BBNJ may succeed only if an agreement is found on both marine genetic resources and MPAs.
9. Context changes can favour one scenario over another. For example, acidification as a global problem can stimulate the adoption of an international agreement, or the financial crisis can lead to the merging of regional seas conventions with RFMOs. This is a reason not to narrow too quickly the scope of action for change, and to try and keep all options open in order to be ready for any window of opportunity.
10. The scenario analysis also emphasised the need to look into the long term: the adoption of any new multilateral agreement will not solve all issues. Its entry into force and implementation will remain a challenge for all stakeholders. Efforts should therefore not only be concentrated on the adoption of an agreement, but also anticipate the question of entry into force and implementation.
11. Communication and outreach will influence the various processes. They might play a key role to overcome unfavourable balances of power, or to increase the understanding of issues by all stakeholders.
12. Last, financing issues are obviously “the elephant in the room”. In particular, for any scenario to deliver strong and sustainable outcomes,

significant assistance will have to be provided to the regions of the world which could need it to endure the respect of their obligations.

All the discussions show that there is a need to act at the three levels (UNCLOS implementing agreement, CBD, and regional initiatives) in a different manner, depending on the windows of opportunity for each of them. As of today, it is not possible to predict which level will move on first. For example, Rio+20 might be a good window of opportunity to push forward the UNCLOS implementing agreement, but will not be decisive for the regional level. This raises the question of which actions should be planned for the short, medium and long terms. During the seminar, a view was expressed that the regional scenario should be prioritised in the short term and the implementing agreement to UNCLOS in the long term. Another view expressed was that the timing is not the most important issue to consider, as the scenarios are complementary: the legal framework may be established under the auspices of the UNGA *via* an implementing agreement to UNCLOS, while debates may continue at the CBD on scientific and technical options and implementation be carried out at the regional level.

This discussion proves that in the near future it will be of utmost importance to be ready to intervene in these three different arenas (UNGA, CBD and within regional frameworks) and to analyse what could be the respective levers of action. As of today, it is impossible to predict which will make progress first on the issue of MPAs in ABNJ. But it is certain that these three arenas will have a role to play in the future.

5.2. Unresolved questions with regard to the nature of MPAs

Interestingly, the seminar also highlighted some open questions, which will need to be discussed and solved in the near future, and for which additional research must be conducted. They pertain mainly to the very nature of MPAs.

As was reminded at the beginning of this paper, the aim of the exercise was to address the issue of multi-sectoral MPAs in ABNJ. But at the international level, there is sometimes a misunderstanding of what is meant by an MPA.

IUCN defined six categories of protected areas, based on their management system (strict nature reserve or wilderness area, national park, national monument or features, habitat/species management area, protected seascape, sustainable use of natural resources). This classification may be difficult to translate in the ABNJ. According to the

general definition given by IUCN (“a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values”), protected areas should be established primarily for conservation purposes, and should not be areas in which commercial activities such as commercial fishing are allowed to proceed without special management measures. A shared understanding is needed so that it is clear that the term “MPA” does not imply the automatic cessation of commercial activity. Depending on the objectives of the MPA, various activities may take place. In some cases, fisheries closures will be an important component of MPAs: the absence of fishing activities may for instance be important to enable the area to serve as a reference for climate change or to allow fish stocks and associated ecosystem to recover.

Another issue with MPAs is their perceived focus on fishing activities. Though fishing is considered

by many as currently being the most important threat to marine biodiversity, other impacts, such as the ones resulting from navigation (noise, pollution, oil spills, invasive species...) are also of concern. In the future, additional threats will grow or emerge. The Census of Marine Life¹³, for example, concluded that climate change will have the greatest impact on the oceans in the future. In this case, it will be necessary to adapt the MPAs in order to address this threat properly.

This leads naturally to the question of the limits of the MPAs. Will it be possible, ultimately, to have the scientific and legal instruments which could allow the creation and management of “ambulatory MPAs”, based, for example, on the seasonal evolution of marine currents? ■

13. http://www.coml.org/comlfiles/policy/ENGLISH_Policy_Report_reduced.pdf

LIST OF PARTICIPANTS

1. Midori Akamine, Director, Marine National Monument Program in the Pacific Islands Region, National Oceanic and Atmospheric Administration (NOAA), United States
2. Serge Beslier, Honorary Director, European Commission,
3. Raphaël Billé, Programme Director Biodiversity, Natural Resources and Adaptation to climate change, IDDRI
4. Duncan Currie, Consultant, Pew Environment Group
5. Bernard Drobenko, Professor of marine and coastal environmental law, University of the Littoral – Opal Coast, ULCO, France
6. Elisabeth Druel, Research Fellow Governance of high seas biodiversity, IDDRI
7. David Freestone, Executive Director, Sargasso Sea Alliance
8. Serge Garcia, Former Director, Fisheries Management Division, Fisheries and Aquaculture Department, Food and Agriculture Organisation (FAO)
9. Kristina Gjerde, High seas policy advisor, IUCN
10. Lyle Glowka, Senior legal adviser, Secretariat of the Convention on Biological Diversity (CBD)
11. Kjartan Hoydal, Former Executive Secretary, North East Atlantic Fisheries Commission (NEAFC)
12. Elie Jarmache, Senior officer Law of the Sea, SG MER
13. David Johnson, Executive Secretary, OSPAR Commission
14. Christophe Lefebvre, Councillor in charge of the Oceans, IUCN and Delegate to International Affairs, French Marine Protected Areas Agency
15. Michael Lodge, Legal advisor, International Seabed Authority (ISA)
16. Nilufer Oral, Co-Chair, IUCN Commission on Environmental Law's Specialist Group on Oceans, Coasts and Coral Reefs
17. Charlotte Salpin, Legal Officer, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations Secretariat
18. Larbi Sbai, Advisor to the Secretary General, Ministry of Fisheries, Morocco
19. François Simard, Deputy Director, Global Marine and Polar Programme, IUCN
20. Despina Symons, Director, EBCD
21. Sébastien Treyer, Director of programmes, IDDRI
22. Philippe Vallette, Director General, Nausicaa
23. Andrew Wright, Executive Secretary, Commission for the Conservation of Antarctic Marine Living resources (CCAMLR)

A legal scenario analysis for marine protected areas in areas beyond national jurisdiction

Report from the Boulogne-sur-Mer seminar, 19-21 September 2011

Elisabeth Druel, Raphaël Billé, Sébastien Treyer (IDDRI)

IDDRI'S PUBLICATIONS

- E. Druel (2011), "Marine protected areas in areas beyond national jurisdiction: The state of play", IDDRI, *Working Papers*, n°07/11.
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