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Getting to yes? Discussions towards an Implementing Agreement to UNCLOS on biodiversity in ABNJ

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BACKGROUND

When adopting the 1982 United Nations Convention on the Law of the Sea (UNCLOS), States recognised *"the desirability of establishing through this Convention, (…) a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment"*.[1] Yet, more than 30 years after the adoption of this international agreement, the question is raised by the international community of whether these ambitious goals have been reached, especially those relating to the governance of marine biodiversity in areas beyond national jurisdiction (ABNJ).

According to UNCLOS, ABNJ encompass the high seas and the Area[2] which, combined together, represent around half of the planet's surface and a significant amount of its biodiversity. These two areas have a different legal status: a traditional regime of freedom applies in the high seas, whereas the Area and its mineral resources are the common heritage of mankind. Over the past decades, the international community has become more and more aware of the increasing threats to ABNJ, e.g. overexploitation of fish stocks, use of destructive fishing practices, ocean acidification, pollution of the marine environment and emergence of threats linked to deep-sea mining or geo-engineering activities.

1. UNCLOS, Preamble.
2. UNCLOS, Article 86: the high seas are *"all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the archipelagic waters of an archipelagic State"* and UNCLOS Article 1 (1) (1): the Area is *"the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"*.

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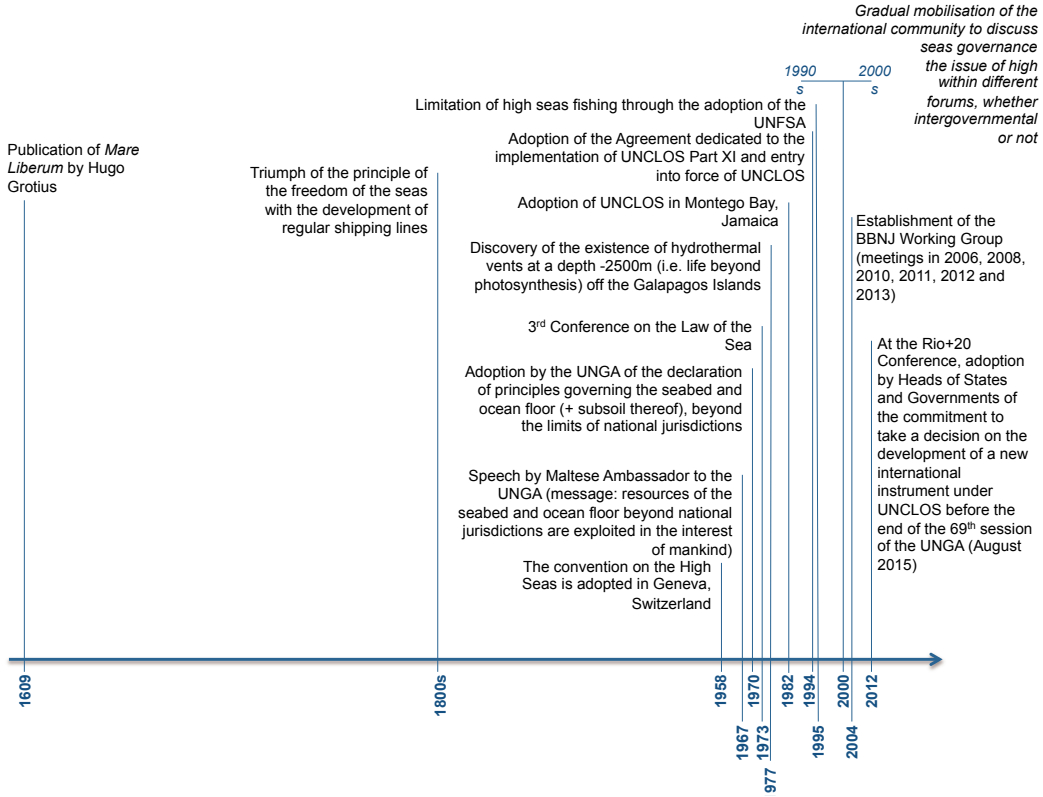
Figure 1. Key dates in the history of high seas governance (courtesy of A. Magnan)



As a result, it was decided to engage discussions on the conservation and sustainable use of marine biodiversity in ABNJ under the auspices of the United Nations General Assembly (UNGA). To this end, 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) was created in 2004, subsequently met in 2006, 2008, 2010, 2011, 2012 and 2013. Early on, discussions in the context of this Working Group focused on the existence or the absence of regulatory and governance gaps in the current international framework and on whether these gaps justify the adoption of an Implementing Agreement to UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ (UNCLOS IA). A fracture line appeared clearly between a large number of States which recognised the need to adopt this new agreement and a small number of States according to which a better implementation of existing instruments is sufficient to conserve and sustainably use marine biodiversity in ABNJ.

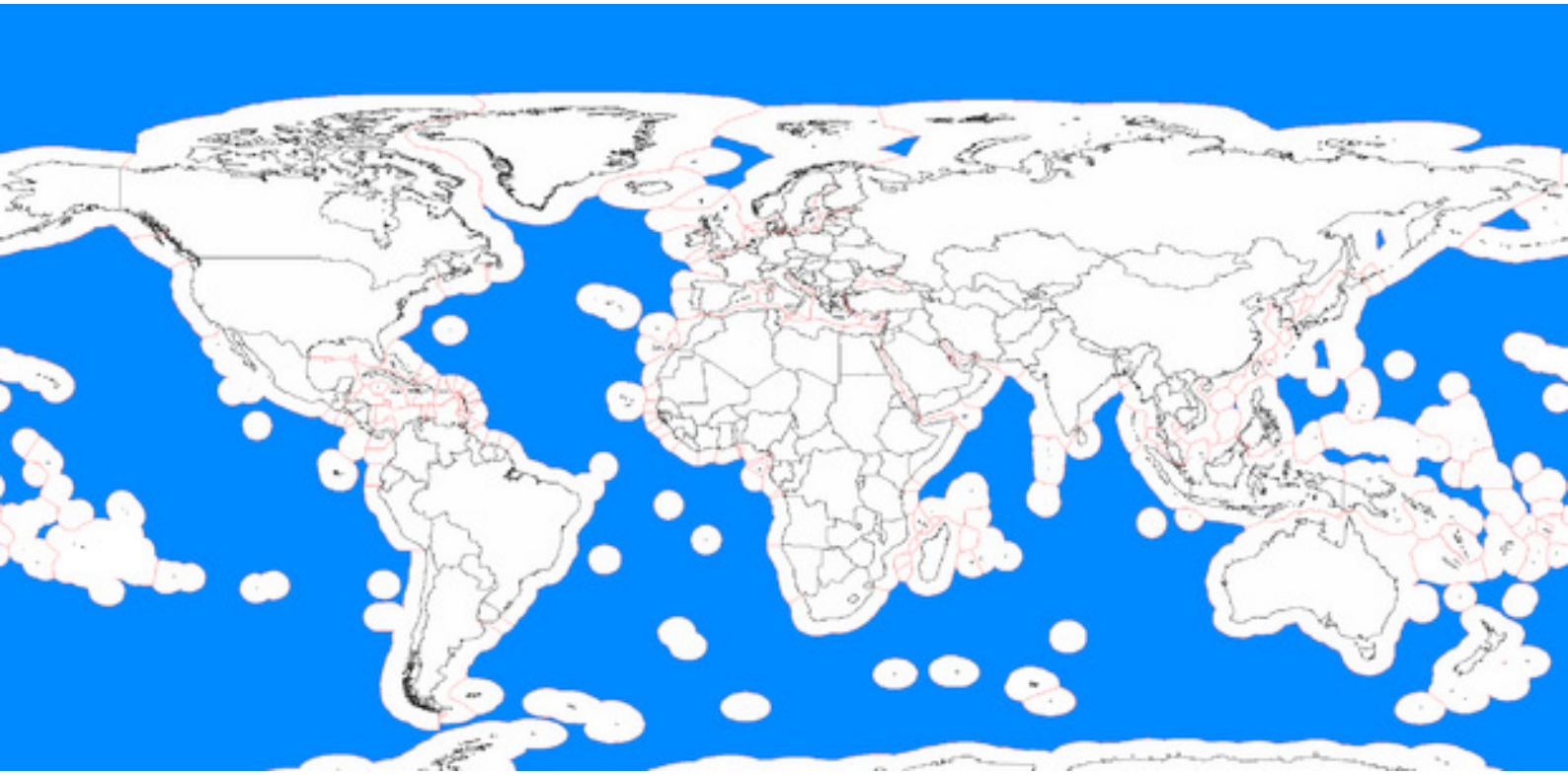
In order to settle this debate in a reasonable timeframe, it was agreed at Rio+20 that States would decide by the end of the 69th session of the UNGA (August 2015) whether or not to launch the negotiations for the conclusion of an UNCLOS IA.[3] To this end, a process will take place in the next months within the BBNJ Working Group: in the course of at least three meetings, States will prepare recommendations to the UNGA on the scope, parameters and feasibility of an international instrument under UNCLOS.

IMPORTANT GAPS TO FILL

Numerous instruments and bodies have a mandate over ABNJ. These include regional organisations (regional fisheries management organisations, regional seas programmes…) and sectoral ones (International Maritime Organisation, International Seabed Authority, International Whaling Commission…). However a crucial problem lies in that *"the myriad of institutions (…) bear no real relationship to one another and operate independent of each other without an overarching framework to*

3. UNGA resolution 66/288 of 27 July 2012, "The future we want", §162.

Map 1. The high seas (highlighted in blue)



Source: http://www.eoearth.org/view/article/51cbef207896bb431f69c8ac/

ensure structure, consistency and coherence".[4] An UNCLOS IA would therefore be instrumental in helping to bring coherence and consistency into the existing fragmented governance system. It could for example foster the development of regional conservation agreements and give an explicit mandate to existing institutions to coordinate their activities and cooperate for the conservation and sustainable use of marine biodiversity in ABNJ.

During the 2011 meeting of the BBNJ Working Group, States recommended to the UNGA that discussions under its umbrella focus on four elements,[5] all enshrined in what was called "the package deal":

- Marine genetic resources, including questions on the sharing of benefits;
- Measures such as area-based management tools, including marine protected areas;
- Environmental impact assessments (EIAs);
- Capacity-building and the transfer of marine technology.

At the heart of the discussions lies the legal uncertainty surrounding the status of marine genetic resources (MGRs). MGRs and the regulation of bioprospection were not addressed as such by UNCLOS since they refer to relatively new concepts associated to activities that were emerging at the time of the negotiations of the Convention. Over time, the need to clarify the legal status of these resources and to establish a fair and equitable access and benefit-sharing regime has emerged, leading to the assumption that this could be done through the adoption of an UNCLOS IA.

Regulatory and governance gaps also exist when it comes to the establishment and management of marine protected areas (MPAs) in ABNJ. Although a few regional initiatives were taken in this respect,[6] they all lack the possibility to provide

4. Tladi D. (2011), "Ocean governance: A fragmented regulatory framework", in *Jacquet P., Pachauri R., Tubiana L. (Eds), Oceans: the new frontier – A planet for life 2011,* Teri Press, pp. 99-111.

5. Document A/66/119, Letter dated 30 June 2011 from the Co-Chairs of the *Ad Hoc* Open-ended Informal Working Group to the President of the General Assembly, §I.1. (a) and (b).

6. See Druel E., Ricard P., Rochette J., Martinez C. (2012), "Governance of marine biodiversity in areas beyond national jurisdiction at the regional level: filling the gaps and strengthening the framework for action – Case

MPAs with the level of international recognition needed to make sure that their management plans are legally binding for third States. An UNCLOS IA could hence establish a mechanism to ensure this recognition and facilitate the establishment of an "*effectively and equitably managed, ecologically representative and well-connected*"[7] system of MPAs in ABNJ.

Furthermore, UNCLOS provides for a general obligation to carry out environmental impact assessments (EIAs) *"when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment"*.[8] The duty to carry out prior assessments does not exist for a number of activities and when it does, it has so far been sparsely and poorly implemented.[9] Reasserting this requirement for all activities, providing for minimum standards for the conduct of EIAs and addressing the need to assess the cumulative impacts of human activities in ABNJ could therefore be done through an UNCLOS IA.

Like for EIAs, UNCLOS contains in its Part XIV specific provisions regarding the transfer of marine technology, which however remain poorly implemented. An UNCLOS IA could therefore help to renew the current approaches towards capacity-building and transfer of marine technology, for example by developing specific provisions to provide or facilitate access to technologies related to biodiversity conservation and MGRs and by establishing a global fund for capacity-building.

In any case, the adoption by States of the 2011 "package" should not lead to the wrong impression that its four elements are the only issues which need to be solved. During the first meetings of the BBNJ Working Group, improving the management of high seas fisheries was also part of the talks, but this issue was slowly removed from the discussions. In 2012, the European Union (EU) made a strong statement according to which *"where activities are already regulated by existing competent authorities and legally binding instruments* [e.g. regional fisheries management organisations, International Seabed Authority, International Whaling Commission]*, the Implementing Agreement should not enter into direct management of these activities"*[10] and this view appeared to be shared by many delegations.

AN OVERVIEW OF STATES' POSITIONS

The consensus found in 2011 around the four issues of the "package" was primarily the result of a deal between the EU and the G77/China. Since the beginning of the discussions in the BBNJ Working Group in 2006, the EU has been promoting the idea of an UNCLOS IA which would facilitate the establishment of MPAs in ABNJ. On the other hand, the G77/China has repeatedly claimed that the common heritage of mankind was applicable to MGRs found in the Area, hence advocating for the establishment of a benefit-sharing mechanism for these resources.

In 2011, these two blocks of States decided to push forward the idea of a "package", which would comprise these two elements (MGRs and MPAs). This initial package was later complemented with EIAs and capacity-building and transfer of marine technology. According to this approach, which was already retained during the negotiations of UNCLOS, *"acceptance by a State of a particular provision is conditioned on the results of bargaining in other areas of negotiations satisfying its requirements. It also implies that in principle all compromises achieved in the course of the negotiations are considered as preliminary arrangements depending on the overall assessment of negotiations as a whole"*.[11]

In 2011 and 2012 (during the United Nations Conference on Sustainable Development known as "Rio+20"), the EU and the G77/China tried to push for opening the negotiations for the adoption of an UNCLOS IA, but finally failed to obtain the requested consensus. Indeed, several States questioned the need to negotiate and adopt a new international agreement. Among them, the US deserves special attention: it is not a Party to UNCLOS, but it participates actively to the work of the BBNJ Working Group, as it is open to all UNGA member States. US main concern with the ongoing discussions lies with the MGRs issue, as they repeatedly stated that *"a new legal regime on MGRs (…) would impede research and development"*.[12] It however recognises that an implementation gap

studies from the North-East Atlantic, Southern Ocean, Western Indian Ocean, South West Pacific and the Sargasso Sea", *Study N°04/12,* IDDRI and AAMP, Paris, France, 102p.

7. CBD COP 10, Decision X/2, Strategic Plan for Biodiversity 2011/2020, Target 11.
8. UNCLOS, Article 206.
9. See Druel E. (2013), "Environmental impact assessments in areas beyond national jurisdiction", *Study N°01/13,* IDDRI, Paris, France, 42p.
10. See EU Presidency Statement – Working Group on Marine Biodiversity – Agenda Item 4 (7 May 2012).
11. Danilenko GM.M (1993), "Law-making in the international community", *Martinus Nijhoff Publishers,* 343p.
12. See for example the 2011 IISD report of the BBNJ Working Group.

exists in the current governance system and has made several proposals to address it.[13] Russia and Venezuela were among the other most noticeable opponents to the agreement.

Other States are in-between: they do not clearly support an UNCLOS IA but do not close completely the door to the opening of the negotiations. It includes important maritime States, such as Japan, Canada, Norway or Iceland. The non-participation of these States to future negotiations, and then to an UNCLOS IA, could have important substantial, political and practical consequences, as they represent a significant share of the research on MGRs and of the human activities carried out in ABNJ.

Finally, a vast majority of States do not participate to the BBNJ Working Group discussions. These meetings usually gather no more than 70 to 80 States representatives, whereas the UN has 193 Members. Although countries from the G77 make much of the coordination ahead of the meetings and give the lead to one country belonging to this group, this leaves an important number of States without any first-hand insight of the discussions—hence without a firmly grounded position. During Rio+20, consensus on opening the negotiations failed to be reached, and it was decided that a decision should be taken at the latest before the end of the 69th session of the UNGA in August 2015. As States will have the possibility to adopt this decision through a vote, one of the challenges is therefore to raise awareness among the "silent majority" about the current discussions, their expected outcomes and potential benefits.

LAUNCHING THE NEGOTIATIONS: SOME TECHNICALITIES

The various players involved in the discussions are now facing a number of difficult questions with regards to the best strategy to open (or not) the negotiations for a new UNCLOS IA. Should this be done through the adoption of recommendations to the UNGA by the BBNJ Working Group or through the adoption of a stand-alone UNGA resolution? There are pros and cons for each option. The BBNJ Working Group has indeed the mandate to adopt recommendations to the UNGA, but can only do so by consensus, making it easy for a few States (or even one) to block their adoption. The second option, i.e. the adoption of a stand-alone UNGA resolution, has already been used in the Law of the Sea history. Indeed, it was through this kind of resolution that States decided in 1993 to establish an intergovernmental conference on straddling fish stocks and highly migratory fish stocks, which finally led to the adoption of the United Nations Fish Stocks Agreement.[14] As it is the case for most of the UNGA resolutions, this resolution was adopted without a vote. But, as of today, UNGA resolutions on "Oceans and the Law of the Sea" are adopted with a vote, offering to a few States a way to manifest their opposition to some of the UNCLOS provisions. Therefore, a vote may take place if such a resolution is to be adopted by the UNGA and it would be politically important to ensure that not only a simple majority but an overwhelming majority of States support it.

CONCLUSION: STRIKING A BALANCE BETWEEN AMBITION AND COMPROMISE

A sense of urgency dominates the current discussions and should be taken into account when States decide whether they embark in a negotiating process for a new UNCLOS IA. This "urgency argument" was already put forward during the preparation of Rio + 20, but failed to convince all participating States. The 69th session of the UNGA will therefore be the second time States are asked to decide whether or not to open the negotiations. It is unlikely there will be a third time: political momentum would vanish, and key players may be reluctant to pursue discussions which have already lasted for ten years.

Opening the negotiations in 2014 or in 2015 would certainly be perceived as a political success by much of the international community and as an important step towards the conservation and sustainable use of marine biodiversity in ABNJ. But a number of issues must not be overlooked. First, opening the negotiations does not mean that an agreement is eventually adopted, or that this agreement ever enters into force. Some States may, for example, not ratify the agreement because they disagree with some of its provisions. On the other hand, in order to find common ground and favour a future entry into force, negotiators may also weaken its provisions, ending up with an agreement of little added value.

The attention of the international community, currently focused on the work undertaken under the auspices of the UNGA, must also not be entirely diverted from the work carried out in other fora. Various instruments are also looking at the

13. *Ibid.*

14. UNGA resolution A/RES/47/192 of 29 January 1993, United Nations Conference on straddling fish stocks and highly migratory fish stocks.

conservation and sustainable use of marine biodiversity in ABNJ. They include *inter alia* (i) the Convention on Biological Diversity, with the ongoing process for the description of Ecologically or Biologically Significant Marine Areas;[15] (ii) the two regional seas programmes, in the North-East Atlantic and the Southern Ocean, which have engaged in the establishment of regional networks of MPAs in ABNJ and other regional seas programmes which are starting to discuss the extension of their mandate over ABNJ;[16] (iii) the International Seabed Authority which is developing environmental management rules for mining exploration in the Area; (iv) or regional fisheries management organisations which are engaged in the process of identifying and protecting vulnerable marine ecosystems. All the measures, actions or possibilities offered by or through existing instruments are concrete steps that can be seen as "low-hanging fruits" if compared to the current global discussions, likely to take years. Pursuing efforts within existing instruments and in the context of the UNGA discussions are therefore two complementary directions more than an alternative.[17] Indeed, existing instruments would benefit from the adoption of an UNCLOS IA, but at the same time, the implementation of this agreement would be greatly facilitated if it could rely upon strong existing sectoral and regional frameworks.

Last, at the dawn of a potential negotiation for a new major global environmental agreement, the oceans community should build on experience and especially face bluntly the relatively poor track record of international law in terms of delivering change. The age of innocence is over: adding more layers of treaties aimed at ensuring sustainability without anticipating on the conditions of their implementation is not an option any longer. This suggests that discussions on means to enforce the would-be implementing agreement—be they legal, technical, financial or else—should be fully integrated within the more substantial discussions about its content rather than postponed as an external variable until it is too late to think about it.

15. Druel E. (2012), "Ecologically or biologically significant marine areas (EBSAs): the identification process under the Convention on Biological Diversity (CBD) and possible ways forward", *Working Paper* N°17/12, IDDRI, Paris, France, 24p.

16. See Druel E., Ricard P., Rochette J., Martinez C. (2012), "Governance of marine biodiversity in areas beyond national jurisdiction at the regional level: filling the gaps and strengthening the framework for action – Case studies from the North-East Atlantic, Southern Ocean, Western Indian Ocean, South West Pacific and the Sargasso Sea", *Study* N°04/12, IDDRI and AAMP, Paris, France, 102p.

17. Ardron J., Druel E., Gjerde K., Houghton K., Rochette J. and Unger S. (2013), "Advancing governance of the high seas", *Policy Brief* N°06/13, IDDRI-IASS, Paris, France, 8p.