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STUDY

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A long and winding road

International discussions on the governance of marine biodiversity in areas beyond national jurisdiction

Elisabeth Druel, Julien Rochette, Raphaël Billé, Claudio Chiarolla (IDDRI)

THE NEED TO CONSERVE AND SUSTAINABLY USE MARINE BIODIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION

Marine areas beyond national jurisdiction represent around half of the Planet's surface and a significant amount of its biodiversity, but there are significant gaps in their governance which prevent their effective conservation and sustainable use. For example, no global and detailed legally-binding frameworks exist for the establishment of marine protected areas or the conduct of environmental impact assessments in these areas and a legal uncertainty surrounds the status of marine genetic resources found in the deep-seabed and in the water column of areas beyond national jurisdiction (ABNJ).

AN ISSUE DEBATED FOR MORE THAN A DECADE

Since the beginning of the 21st century, States have started to discuss, in various arenas, the conservation and sustainable use of marine biodiversity in ABNJ. This debate was prompted by increased evidence of threats to these areas (overexploitation, climate change, ocean acidification, pollution…) and new scientific discoveries regarding the richness of marine genetic resources. In view of these elements, major blocks of countries such as the European Union and the G77/China have agreed on the need to develop a new international instrument which could facilitate the development of modern conservation and management tools, whereas some developed States including the US have opposed this position, favoring a better implementation of existing instruments.

AN OPPORTUNITY TO LAUNCH THE NEGOTIATIONS FOR THE ADOPTION OF A NEW INTERNATIONAL AGREEMENT

In 2011, debating under the auspices of the United Nations General Assembly, States agreed that future discussions should be structured around four topics: marine genetic resources, area-based management tools, environmental impact assessments and capacity-building and the transfer of marine technology. It was also further agreed in 2012 that the decision to launch the negotiations for the adoption of a new international agreement should be taken before the end of the 69th session of the United Nations General Assembly (by August 2015), giving to this issue an extreme topicality.

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This text is the second version of the study: it has been updated following the 6th meeting of 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, which took place from 19-23 August 2013, in New York (United States).

Context of the report
In 2011, IDDRI formed a partnership agreement with the French Marine Protected Areas Agency concerning the governance of marine biodiversity in areas beyond national jurisdiction. In this regard, IDDRI is focusing on the clarification of key questions for international events relating to the governance of marine biodiversity in areas beyond national jurisdiction and is also conducting various research projects. This report has been realised as part of the work programme established through this partnership agreement.

Disclaimer
The views expressed in this document are those of the authors and do not necessarily reflect those of individuals or organisations consulted in the course of this study.

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LIST OF ACRONYMS

ABNJ	Areas Beyond National Jurisdiction
ABS	Access and benefit-sharing
ACAP	Agreement on the Conservation of Albatrosses and Petrels
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
CBD	Convention on Biological Diversity
CCAMLR	Commission on the Conservation of Antarctic Marine Living Resources
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties
CMS	Convention on Migratory Species
DOALOS	Division for Ocean Affairs and the Law of the Sea
EBSA	Ecologically or Biologically Significant Marine Area
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
FAO	Food and Agriculture Organisation of the United Nations
ICP	United Nations Informal Consultative Process on Oceans and the Law of the Sea
IMO	International Maritime Organisation
IOC-UNESCO	Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organisation
ISA	International Seabed Authority
IUCN	International Union for Conservation of Nature
IUU fishing	Illegal, Unreported and Unregulated fishing
IWC	International Whaling Commission
MGR	Marine Genetic Resource
MPA	Marine Protected Area
NEAFC	North-East Atlantic Fisheries Commission
OSPAR Convention	Convention for the Protection of the Environment of the North-East Atlantic
PSSA	Particularly Sensitive Sea Area
RFMO	Regional Fisheries Management Organisation
SEA	Strategic Environmental Assessment
SPREP Convention	Convention for the Protection of the Natural Resources and Environment of the South Pacific
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS IA	United Nations Convention on the Law of the Sea Implementing Agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction
UNCSD	United Nations Conference on Sustainable Development
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNFSA	United Nations Fish Stocks Agreement
UNGA	United Nations General Assembly
VME	Vulnerable Marine Ecosystem

1. INTRODUCTION

1.1. Marine areas beyond national jurisdiction

Representing around half of the planet's surface and a significant amount of the Earth's biodiversity, marine areas beyond national jurisdiction (ABNJ) encompass the high seas and the Area.

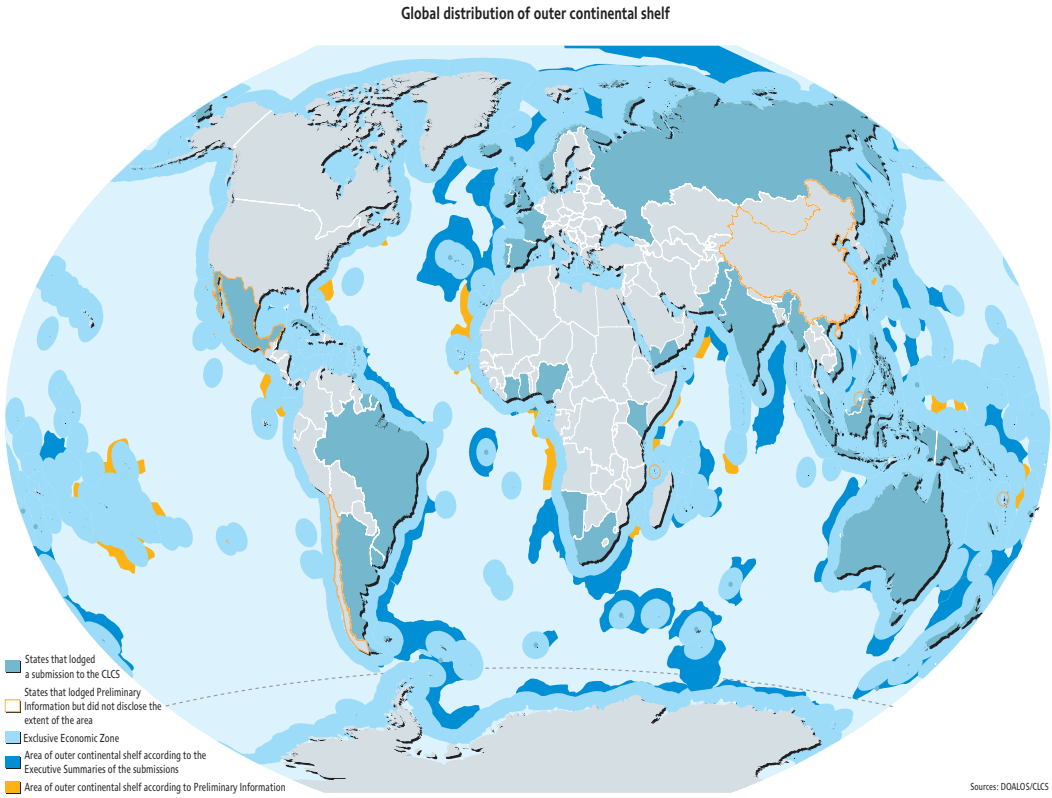
The Area

According to the United Nations Convention on the Law of the Sea (UNCLOS),[1] the Area is *"the seabed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction";*[2] in other words, the Area is located either beyond the limits of the continental shelves of States (200 nautical miles) or beyond the limits of their extended continental shelves, when it exists (350 nautical miles or not exceeding 100 nautical miles from the 2,500 metre isobath).[3] The Area and its mineral resources (solid, liquid or gaseous) have a specific legal status, inspired by a declaration made in 1967 at the United Nations by the Maltese Ambassador Arvid Pardo. According to this specific status which was proclaimed in a United Nations General Assembly (UNGA) resolution adopted in 1970 and enshrined in UNCLOS, they are the common heritage of mankind,[4] and activities in the Area shall therefore be conducted for the benefit of mankind as a whole.[5] An international organisation, the International Seabed Authority (ISA), based in Kingston, Jamaica, has been established as the competent organisation through which States Parties *"organise and control activities in the Area, particularly with a view to administering the resources of the Area"*.[6]

For almost two decades now, the ISA has been elaborating regulations related to deep-seabed mining. They are gathered in the "Mining Code", a *"comprehensive set of rules, regulations and procedures"*[7] which covers inter alia regulations for prospecting and exploration of polymetallic nodules, polymetallic sulphides and cobalt-rich crusts. Since its mandate covers the protection of the marine environment,[8] the ISA also develops norms aimed at ensuring an *"effective protection for the marine environment from harmful effects which may arise"* from activities conducted in the Area. Finally, in accordance with Article 143 of UNCLOS,[9] this organisation also has some responsibilities in the field of marine scientific research coordination and promotion.

1. Adopted in 1982 and entered into force in 1994, UNCLOS currently has 165 Contracting Parties.
2. UNCLOS, Article 1.
3. UNCLOS, Article 76.
4. Article 136 of UNCLOS: *"The Area and its resources are the common heritage of mankind"* and Article 133 (a) of UNCLOS: *"resources mean all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules".*
5. Article 140 of UNCLOS: *"Activities in the Area shall (…) be carried out for the benefit of mankind as a whole".*
6. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Annex, Section 1, (1). This Agreement, adopted in 1994, is the first Implementing Agreement to UNCLOS.
7. For a presentation of the Mining Code, see: http://www.isa.org.jm/en/mcode.
8. UNCLOS, Article 145.
9. UNCLOS Article 143 (2): *"(…) the Authority shall promote and encourage the conduct of marine scientific research in the Area and shall coordinate and disseminate the results of such research and analysis when available".*

Figure 1. Global distribution of outer continental shelves as of September 2010



Source: Schoolmeester *et al.,* 2011.

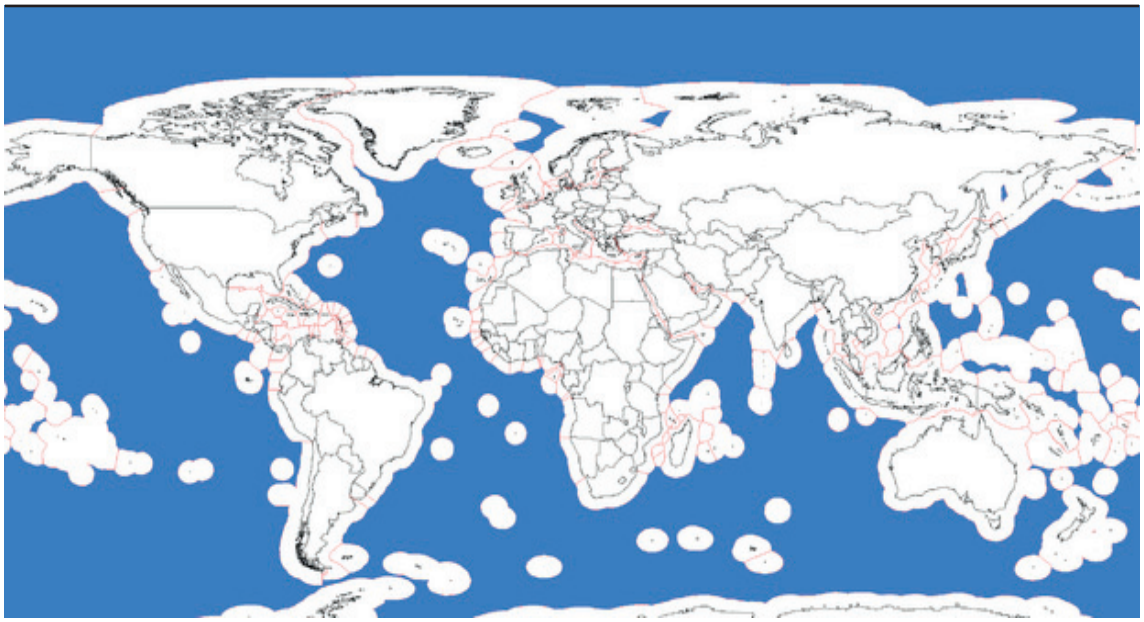
The high seas

The traditional principle of freedom of the seas, inherited from the 17th century, applies in the high seas, which encompass the water column found after the Exclusive Economic Zones (EEZs) of coastal States.[10] In 1609, in his book entitled *Mare Liberum,* the Dutch jurist Hugo Grotius formulated the principle according to which the seas are free. Grounded in the desire to establish the freedom of navigation, this principle triumphed in the 19th century, when the regular shipping lines were established. It was further endorsed through the Convention on the High Seas adopted in Geneva, Switzerland, in 1958. Despite several constraints, including considerable geographical limitations with the establishment of EEZs following the adoption of UNCLOS, this principle has been regularly cited. In UNCLOS, it is recalled in Article 87, which provides a non-exhaustive list of freedoms of the high seas: (i) freedom of navigation; (ii) freedom of overflight; (iii) freedom to lay submarine cables and pipelines; (iv) freedom to construct artificial islands and other installations permitted under international law; (v) freedom of fishing, and (vi) freedom of scientific research.

However, over the past decades, and due in particular to the continuous degradation of the state of oceans and seas, high seas freedoms have been progressively restricted. One emblematic example of these limitations is related to the freedom of fishing. Following the adoption of UNCLOS, *"more coastal States claimed their rights and jurisdiction over fisheries in the EEZ, large distant-water fishing fleets were displaced from some of their traditional fishing grounds and the pressure to fish in the high seas grew rapidly and without much control"* (Maguire *et al.*, 2006). Aware of the problem, States agreed during the 1992 United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, to convene an intergovernmental conference under the auspices of the United Nations to promote the effective implementation of the provisions of UNCLOS related to straddling and highly migratory fish stocks. This Conference led to the adoption, in 1995, of the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating

10. The high seas are defined in Article 86 of UNCLOS as *"all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State".*

Figure 2. The high seas



Note: The high seas are highlighted in blue.

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

to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, otherwise known as the United Nations Fish Stocks Agreement (UNFSA). This agreement subsequently entered into force in 2001.[11]

The UNFSA does not specifically cover all species of fish found in ABNJ, but those that are straddling[12] or highly migratory.[13] High seas species not specifically covered by the agreement are termed "discrete high seas fish stocks" or "high seas stocks".[14] Despite this original gap, the adoption of the UNFSA constituted a milestone in terms of fisheries management in ABNJ, as it considerably limits the traditional principle of freedom of fishing in the high seas for the sake of conservation and sustainable use of the stocks concerned. In particular, it defined some guiding principles for the conservation and management of fish stocks. This included the application of precautionary and ecosystem approaches and the protection of biodiversity in the marine environment.[15] The adoption of the UNFSA has also prompted the establishment of more regional fisheries management organisations (RFMOs),[16] defined standards for RFMO performance and led to more participation to these RFMOs.[17] States Parties (and their vessels) to UNFSA are required to join either the relevant RFMOs or to agree to abide by their conservation and management measures.

11. After the 1994 Agreement related to the implementation of Part XI of UNCLOS, this was the second Implementing Agreement to the Convention.
12. According to Article 63 (2) of UNCLOS, straddling fish stocks are those that are found both in the EEZ of a coastal State and in the high seas.
13. A list of highly migratory species can be found in UNCLOS Annex I. It comprises 17 species, including tunas, cetaceans, sharks and dolphins.
14. The 2006 Review Conference of the UNFSA encouraged States, as appropriate, to recognise that the general principles of the Agreement should also apply to discrete fish stocks in the high seas (Document A/CONF.210/2006/15, Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (5 July 2006), Preamble, §. 2.
15. UNFSA Article 5.
16. UNFSA Article 8 (5): *"where there is no subregional or regional fisheries management organisation or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the sub-region or region shall cooperate to establish such an organisation or enter into other appropriate arrangements to ensure conservation and management of such stock (…)".*
17. UNFSA Article 8 (4): *"Only those States which are members of such an organisation or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organisation or arrangement, shall have access to the fishery resources to which those measures apply".*

1.2. Increasing pressures and threats to ABNJ and the beginning of international discussions

Since the adoption of UNCLOS in 1982, human activities in ABNJ have developed exponentially:

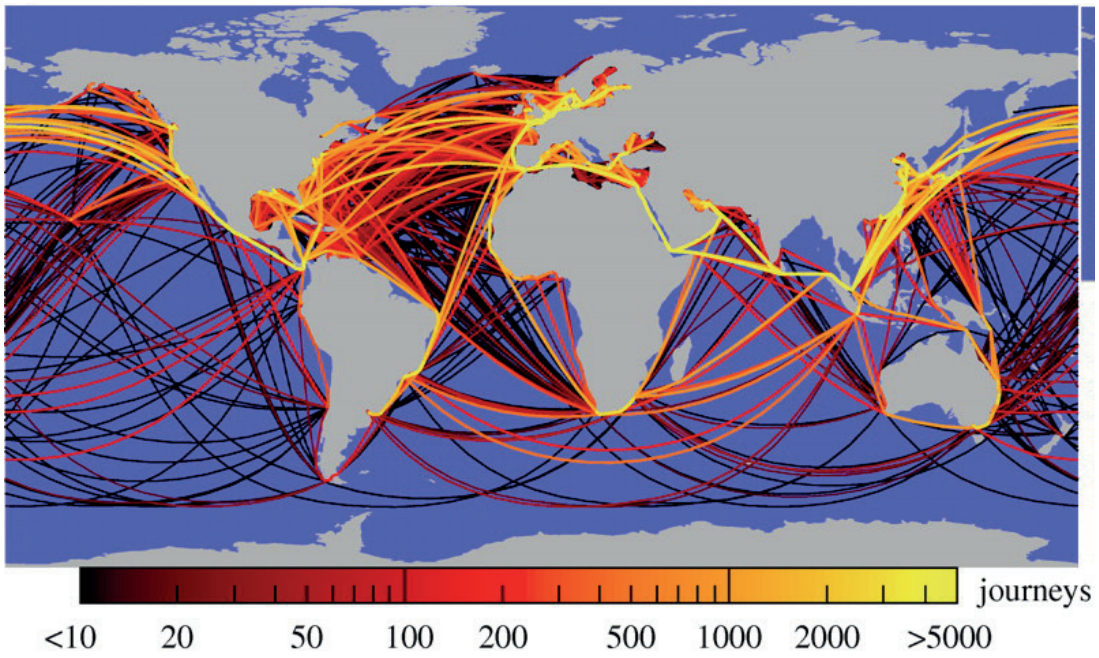
- Around 90% of world trade is now carried by the international shipping industry;[18] Depletion of fish stocks in marine areas within national jurisdiction has led to increased fishing for deep-sea stocks such as orange roughy and alfonsino, for straddling fish stocks such as jack mackerel and for highly migratory stocks such as tunas;[19]
- Exploration of mineral resources in the Area is now underway with 17 contracts for exploration signed between contractors and the ISA in the Clarion-Clipperton Fracture Zone in the Pacific Ocean, in the Western Indian Ocean, and on the Mid-Atlantic Ridge…;[20]
- Bioprospecting has expanded into ABNJ (Arnaud-Haond *et al.*, 2011);
- Other activities affecting marine biodiversity in ABNJ, such as offshore mariculture[21] or climate engineering activities are likely to be developed in the future, and some of them like ocean fertilisation are already at the experimentation stage.[22]

As a result, anthropogenic pressures in these areas are increasing. Conducted over 10 years (from 2000 to 2010), the Census of Marine Life concluded in 2010 that *"past impacts in the deep sea were mainly from disposal of waste and litter. Today, fisheries, hydrocarbon and mineral extraction have the greatest impact. In the future, climate change is predicted to have the greatest impact"* (Census of Marine Life, 2011). To this impact must be added ocean acidification, the topic of the 2013 United Nations Informal Consultative Process on Oceans and the Law of the Sea (ICP). For a long time, because of their remoteness and the lack of human knowledge, ABNJ were thought to be rather pristine and their biodiversity de facto protected from the impacts of human activities. As human activity has expanded further into these areas and as climate change, ocean acidification and pollution have an increasing impact on the oceans, together with a growing knowledge about these ecosystems, this view has been gradually revealed to be inaccurate. As a result, the following question has been raised: what can be done to conserve and sustainably use marine biodiversity in ABNJ?

Around 15 years ago, the international community became aware of these threats and started to discuss the issue of the conservation and sustainable use of marine biodiversity in ABNJ. As early as 2001, Germany and Australia hosted a workshop on "managing risks to biodiversity in ABNJ" which looked at the issue of marine protected areas (MPAs) in the high seas. This was followed, in 2002, by an ICP dedicated inter alia to the protection and preservation of the marine environment and at which ABNJ related issues were also discussed.[23] In 2003, a "Ten Year High Seas Marine Protected Areas Strategy" for the development of a global representative system of high seas MPA networks was agreed by marine theme participants at the Vth IUCN World Parks Congress (Durban, South Africa, 8-17 September 2003).[24] This strategy called for *"supporting high level consideration of the need for additional mechanisms, including UNCLOS implementing agreements, to facilitate the effective management of a global representative system of* [high seas MPAs] *networks and an effective governance system"*.[25] Parties to

18. In 2011, total seaborne trade reached an estimated 8.7 billion tons. See UNCTAD (2012), "Review of maritime transport 2012", *United Nations Publication*, 196p.
19. The 2012 State of World Fisheries and Aquaculture report prepared by the Food and Agriculture Organisation (FAO) of the United Nations underlined that *"the declining global marine catch over the last few years together with the increase percentage of overexploited fish stocks and the decreased proportion of non-fully exploited species around the world convey the strong message that the state of world marine fisheries is worsening and has had a negative impact on fishery production (…). The situation seems more critical for some highly migratory, straddling and other fishery resources that are exploited solely or partially in the high seas"* (FAO, 2012).
20. See the list of contractors under: http://www.isa.org.jm/en/scientific/exploration/contractors.
21. Participants to the Offshore Mariculture Conference held in Izmir, Turkey, on 17-19 October 2012, requested the FAO to conduct an assessment of the access and operational frameworks for open ocean mariculture in the high seas. See for instance: http://www.fishupdate.com/news/fullstory.php/aid/18454/Offshore_mariculture_industry_looks_to_high_seas_opportunities.html.
22. An ocean fertilisation activity, *"involving the deliberate introduction into surface waters of 100 metric tons of iron sulphates"*, took place illegally in July 2012, in waters off the Canadian west coast. This experiment was followed by numerous declarations of concern from the international community. See: http://www.imo.org/OurWork/Environment/SpecialProgrammesAndInitiatives/Pages/London-Convention-and-Protocol.aspx.
23. See the report of the meeting at: http://www.un.org/depts/los/consultative_process/consultative_process.htm
24. See http://data.iucn.org/themes/marine/pdf/10-Year_HSMPA_Strategy_SummaryVersion.pdf.
25. A workshop on the governance of high seas biodiversity conservation held in Cairns, Australia, from 16-19 June

Figure 3. Trajectories of all cargo ships bigger than 10 000 GT in 2007

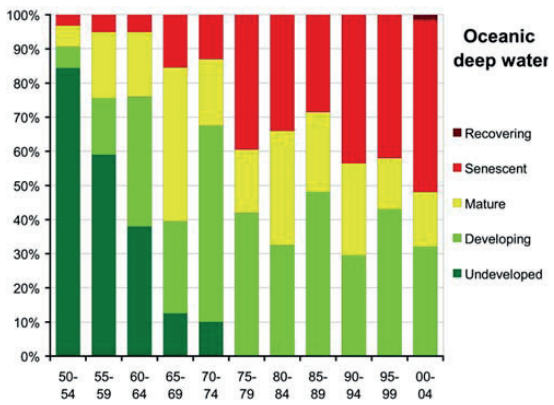


Source: Kaluza *et al.*, 2010.

the Convention on Biological Diversity (CBD) had also looked into the issue early on. In 2005, the CBD published a technical study on "the international legal regime of the high seas and the seabed beyond the limits of national jurisdiction and options for cooperation for the establishment of MPAs in marine areas beyond the limits of national jurisdiction".[26] This study also suggested that an implementing agreement to UNCLOS was one possible option to facilitate the establishment and management of MPAs in ABNJ.

In 2004, the ICP focused on *"New Sustainable Uses of the Oceans, including the Conservation and Management of the Biological Diversity of the Seabed in Areas beyond National Jurisdiction"*.[27] Two different issues began to generate some discussion: the effective balance which needs to be found between high seas freedom and the duty to protect and preserve the marine environment; and the idea that the current regime applicable to the exploitation of marine genetic resources in ABNJ was not satisfactory. That same year, a specific

Figure 4. Percentage of the world's top oceanic-deep-water marine fishery resources in various phases of fisheries development, 1950-2004



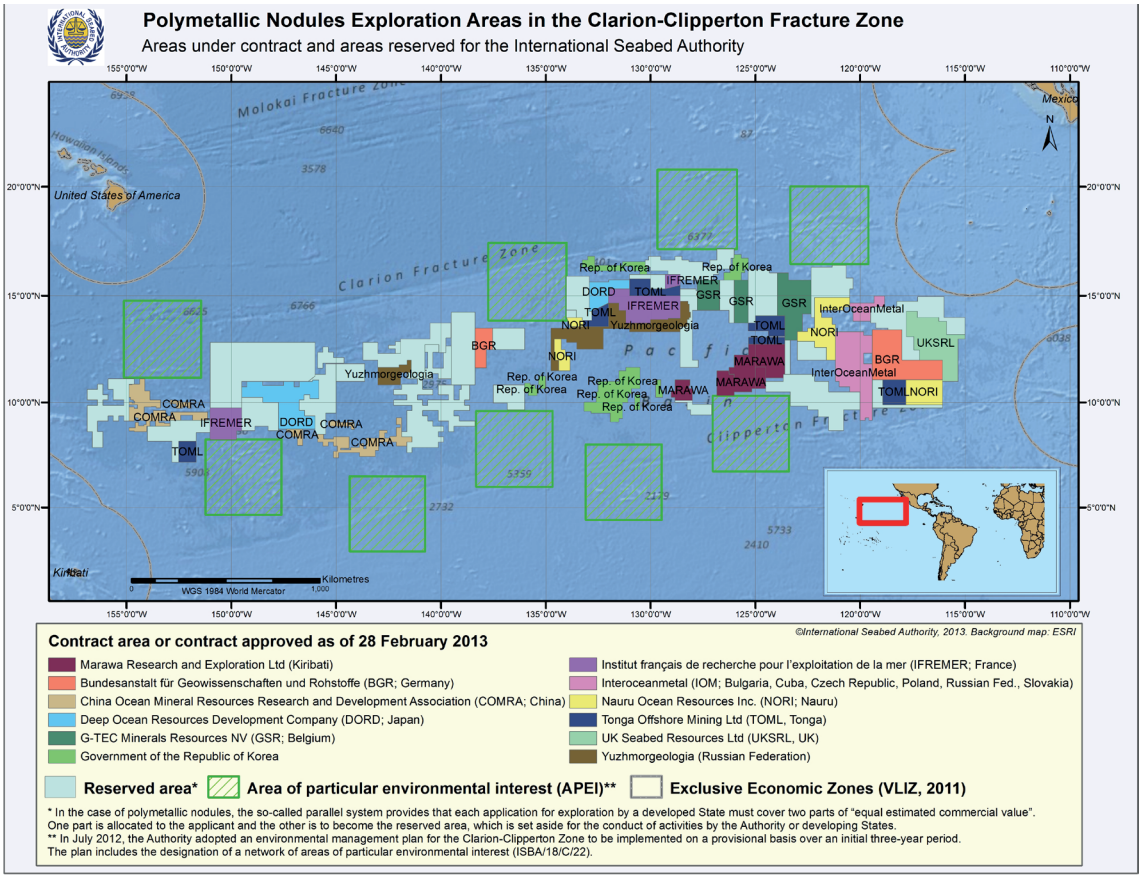
Source: Maguire *et al.*, 2006.

2003, also came to the conclusion that implementing agreements under UNCLOS were a possible option.

26. See http://www.cbd.int/doc/publications/cbd-ts-19.pdf.

27. Document A/59/122, "Report of the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting".

Figure 5. Polymetallic Nodules Exploration Areas in the Clarion-Clipperton Fracture Zone



Source: http://www.isa.org.jm/en/scientific/exploration)

forum was established by resolution 59/24 of the UNGA *"to indicate (…) where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond national jurisdiction"*.[28] This 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 (known as "the BBNJ Working Group") has met in 2006, 2008, 2010, 2011, 2012, and 2013.

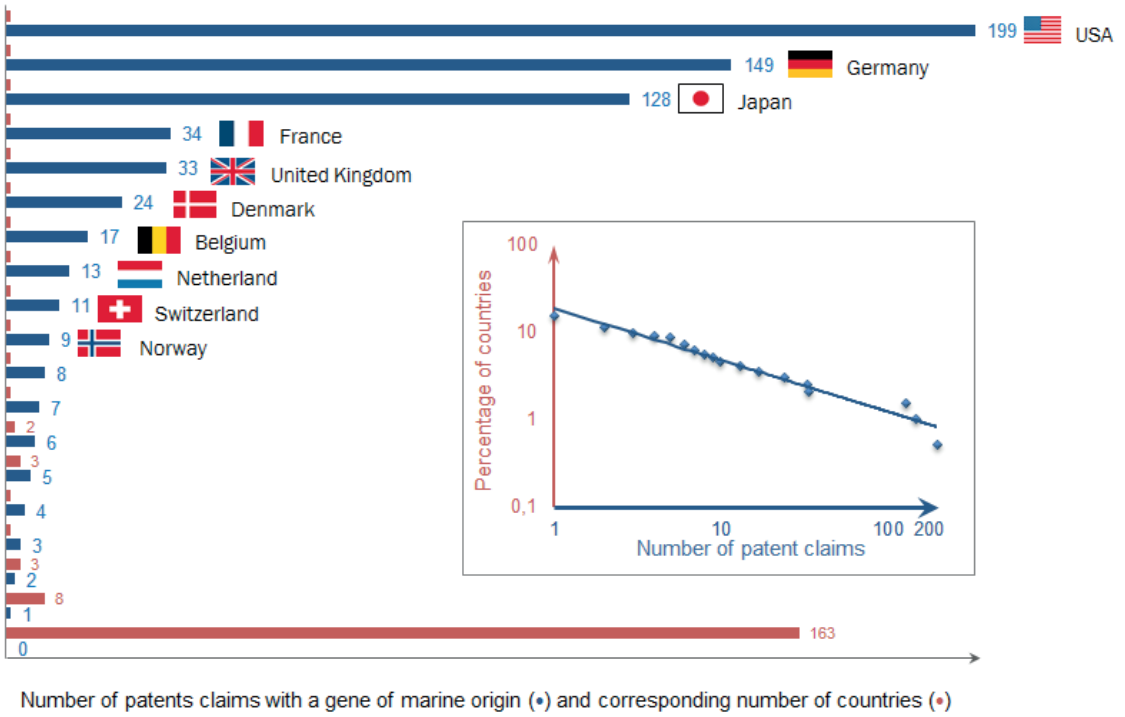
As time went on, discussions became more and more polarised between States advocating that a new UNCLOS Implementing Agreement would be needed for the effective conservation and sustainable use of marine biodiversity in ABNJ, and States advocating that no new instrument would be necessary, provided that a better implementation of existing instruments could be ensured. The opposition between these two groups was particularly clear during the 2012 United Nations Conference on Sustainable Development (UNCSD or "Rio + 20").[29] At Rio + 20, many States sought the adoption of a political agreement to launch, under the auspices of the UNGA, negotiations for the adoption of an UNCLOS Implementing Agreement on the conservation and sustainable use of marine biodiversity in ABNJ (an UNCLOS IA). But, as a result of opposition from a few influential States, the necessary political consensus was not reached. Instead, Heads of States and Governments committed *"to address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea"* at the latest before the end of the 69th session of the UNGA in August 2015.[30]

28. UNGA resolution 59/24 of 17 November 2004, §73.

29. Held in Rio de Janeiro, Brazil, twenty years after the UNCED.

30. UNGA resolution A/66/288, *The future we want*, §162.

Figure 6. Patent claims with a gene of marine origin with source



Source: Arnaud-Haond *et al.*, 2011.

1.3 Objectives of this report

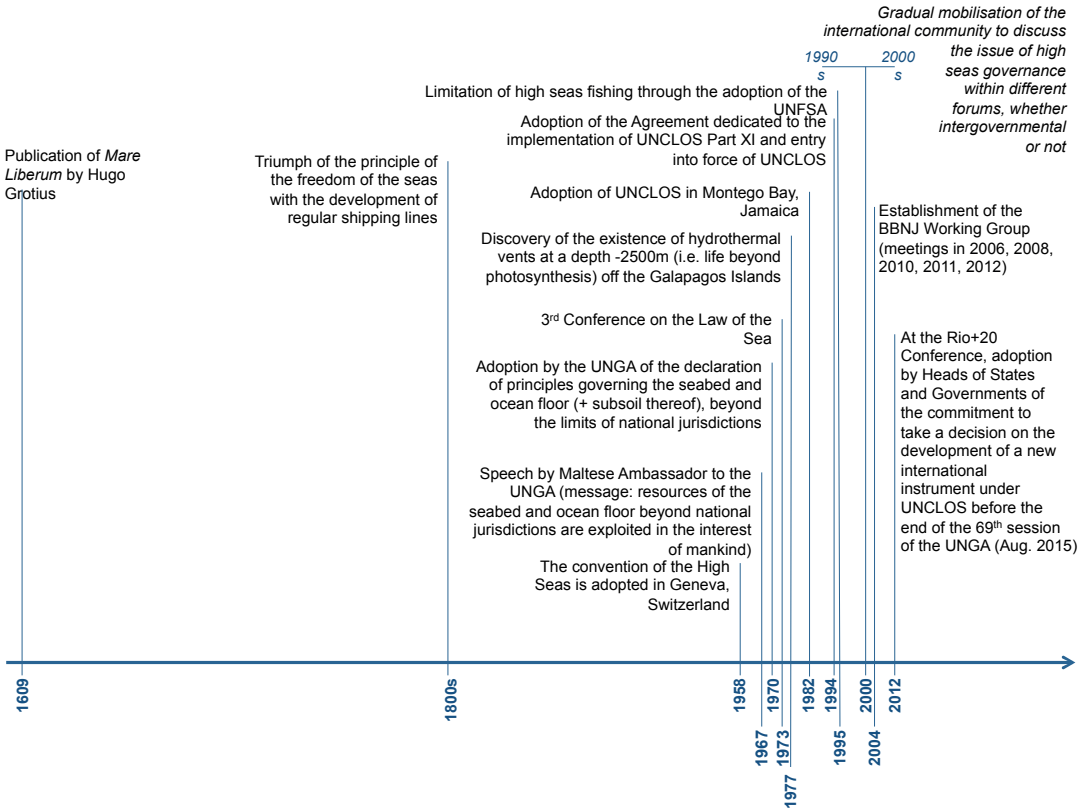
The next year and a half will therefore be crucial, as States will have to decide whether or not they launch, under the auspices of the UNGA, negotiations for the conclusion of an UNCLOS Implementing Agreement on the conservation and sustainable use of marine biodiversity in ABNJ. Given the historical importance of the decision to be made, it is crucial that interested stakeholders, beyond the small circle of those usually involved, have a clear and comprehensive understanding of the current process. This report intends to inform such stakeholders as well as to suggest ways to move forward.

Section 2 of this report describes the state of play of the governance of marine biodiversity in ABNJ. It highlights some of the key duties and objectives adopted in various international fora and describes the current fragmented institutional framework. Section 3 identifies the major issues the international community is facing with respect to the conservation and sustainable use of marine biodiversity in ABNJ.

These issues were taken into consideration when States decided to establish, under the auspices of the UNGA, a dedicated Working Group on marine biodiversity in ABNJ. Section 4 of this report gives an overview of the history of this BBNJ Working Group and of the discussions which led to the adoption in 2011 of what was called "the package deal". Section 5 focuses on the positions adopted by States in the context of these discussions, highlighting how they evolved over time and their respective views on the four elements of the 2011 "package" (marine genetic resources, including the sharing of benefits, area-based management tools, including marine protected areas, environmental impact assessments, and capacity-building and the transfer of marine technology).

In section 6, next steps and possible ways forward are discussed. It also features some suggestions regarding the possible content of an UNCLOS Implementing Agreement on the conservation and sustainable use of marine biodiversity in ABNJ and on other complementary actions.

Figure 7. Key dates in the history of high seas governance (courtesy of A. Magnan)



2. GOVERNANCE OF MARINE BIODIVERSITY IN ABNJ: THE STATE OF PLAY

2.1. Duties and objectives related to the conservation and sustainable use of marine biodiversity in ABNJ

UNCLOS provides for some general environmental duties, applicable to both the high seas and the Area. They include:

(i) The general duty to protect and preserve the marine environment;[31]

(ii) The duty to conserve and manage the living resources of the high seas;[32]

(iii) The duty to prevent, reduce and control pollution of the marine environment.[33]

(iv) The duty to take the measures "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";[34]

(v) The duties of States to cooperate with other States both at the regional and global levels.[35]

Because of these specific duties, authors such as Freestone (2009) argue that freedoms of the high seas *"are not absolute rights but are subject to a number of limitations and corresponding duties upon which their legal exercise is pre-conditioned"*.

In the framework of the Convention on Biological Diversity (CBD),[36] several objectives relevant

31. UNCLOS, Article 192: *"States have the obligation to protect and preserve the marine environment"*.
32. UNCLOS, Articles 116-119 on the conservation and management of the living resources of the high seas.
33. UNCLOS, Articles 194-196 on the measures to prevent, reduce and control pollution of the marine environment, the duty not to transfer damage or hazards or transform one type of pollution into another and the use of technologies or introduction of alien or new species and UNCLOS Articles 207-212 on the international rules and national legislation to prevent, reduce and control pollution from (i) land-based sources, (ii) seabed activities subject to national jurisdiction, (iii) activities in the Area, (iv) dumping from vessels, (v) the atmosphere.
34. UNCLOS, Article 194 (5).
35. UNCLOS, Article 197 on the cooperation on a global or regional basis; UNCLOS, Articles 242-244 on international cooperation with respect to marine scientific research.
36. Adopted in 1992 and entering into force in 1993, the CBD currently has 193 Contracting Parties and has

to marine biodiversity in ABNJ were adopted in 2010.[37] These objectives are known as "the Aichi Biodiversity Targets" and include amongst others:

- *"Target 3: By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimise or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions";*
- *"Target 6: By 2020, all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem-based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits";*
- *"Target 10: By 2015, the multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification are minimised, so as to maintain their integrity and functioning";*
- *"Target 11: By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes".*

Recalling the importance of this Target 11,[38] the Rio + 20 outcome document also reaffirmed some important goals and principles. In particular, States committed *"to protect and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development".*[39] This commitment applies to marine areas within and beyond national jurisdiction.

2.2. A highly fragmented governance framework

The general objective of UNCLOS is to establish *"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".*[40] It is therefore seen as a "Constitution for the oceans", or an overarching legal framework within which all activities in the oceans and seas must be carried out. However, UNCLOS does not preclude the existence of other instruments or agreements also applicable to the oceans and seas. Before the adoption of UNCLOS in 1982, a large variety of international instruments applicable to the oceans already existed and new ones were adopted after its entry into force. For that reason, the oceans governance framework has often been characterised as "fragmented" (Tladi, 2011). This is particularly true for the specific governance framework of ABNJ where a number of international agreements or instruments are applicable, mostly on a sector or issue-based basis, and sometimes also on a geographical basis. The following list does not intend to be exhaustive, but rather to provide some striking examples of these sector- or issue-based instruments.

- Fishing in ABNJ is addressed in the Food and Agriculture Organisation of the United Nations (FAO), which provides guidance through the adoption of codes of conduct, plans of action and legally-binding instruments. This global body is complemented, at the regional level, by RFMOs, which manage straddling and highly migratory fish stocks ("tuna RFMOs") or high seas fish stocks ("non-tuna RFMOs") under their competence in ABNJ.
- Exploration and exploitation of the mineral

therefore reached an almost universal coverage, with the exception of Andorra, the Holy See, South Sudan and the US.

37. CBD COP 10, Decision X/2, Strategic Plan for Biodiversity 2011/2020.

38. *"We note decision X/2 of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity (…) that, by 2020, 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are to be conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures"* – UNGA resolution 66/288 of 27 July 2012, *The future we want*, §177.

39. UNGA resolution 66/288 of 27 July 2012, *The future we want*, § 158.

40. UNCLOS Preamble.

resources of the Area are regulated by the ISA.

- Shipping and dumping of wastes are regulated through international conventions adopted in the framework of the International Maritime Organisation (IMO).[41]
- Marine science is globally discussed in the framework of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organisation (IOC-UNESCO).
- Other sectoral instruments are also applicable in ABNJ. They include the International Convention on the Regulation of Whaling - which established the International Whaling Commission (IWC) - the Convention on Migratory Species (CMS), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Agreement on the Conservation of Albatrosses and Petrels (ACAP).
- Finally, a few regional seas programmes established under the United Nations Environment Programme (UNEP) umbrella or associated to it have the specific mandate to address environmental issues in ABNJ (Druel *et al.*, 2012b): the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, and the Convention for the Protection of the Natural Resources and Environment of the South Pacific (the SPREP Convention). In the Southern Ocean, the Antarctic Treaty and its Protocol on Environmental Protection (the Madrid Protocol) and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR Convention), which is sometimes described as being a "quasi-RFMO" operate to manage a wide range of activities in ABNJ in the Southern Ocean.[42]

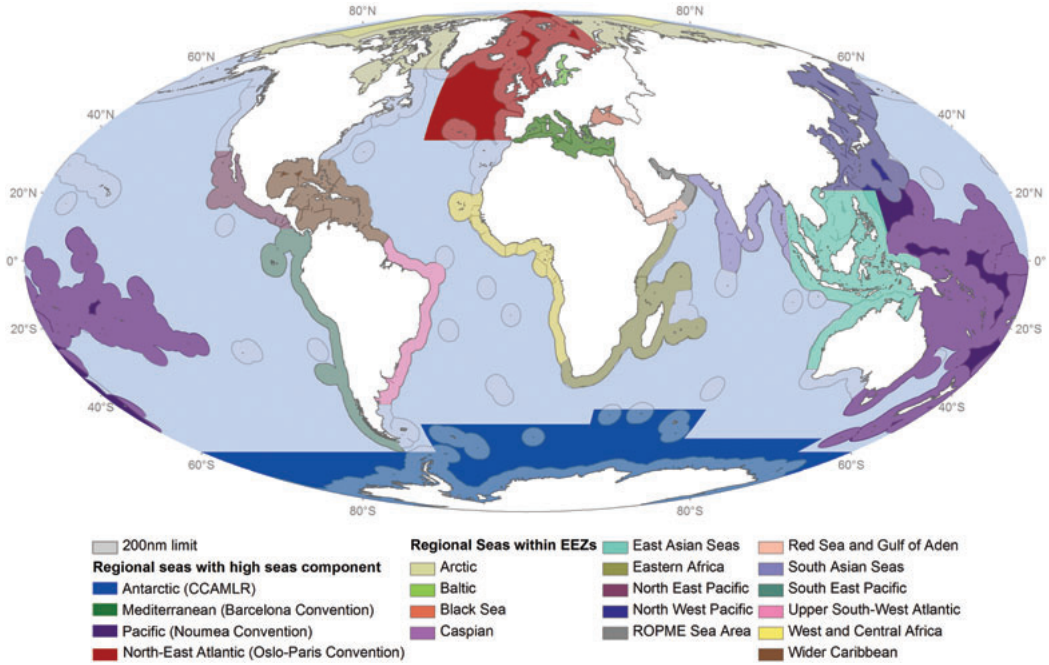
All these instruments provide some opportunities to enhance the conservation and sustainable use of marine biodiversity in ABNJ. However, there is a crucial problem in that *"the myriad of institutions described above bear no real relationship to one another and operate independent of each other without an overarching framework to ensure structure, consistency and coherence"* (Tladi, 2011).

The CBD also has a role to play in the conservation and sustainable use of marine biodiversity in ABNJ. Indeed, the objectives of this Convention *"are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources"*.[43] These objectives appear to match the current concerns regarding marine biodiversity in ABNJ. This Convention also benefits from an almost universal acceptance, with 193 State Parties. In addition, there is unquestionably a CBD mandate over ABNJ, although the extent of this mandate has very often been questioned (Gjerde *et al.*, 2012): the Convention indeed applies, in relation to each Contracting Party, *"in the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction"*.[44] In ABNJ, CBD Contracting Parties are also requested to cooperate directly or through competent international organisations.[45] In addition, the Conference of the Parties (COP) to the CBD has adopted a series of targets also applicable to marine biodiversity in ABNJ (see section 2.1.).

But Contracting Parties have in practice limited the role of the CBD to the provision of scientific and technical information and advice relating to marine biodiversity in ABNJ. Such information and advice should primarily be sent to the UNGA.[46] The main process through which such information is delivered is the one set up under the CBD umbrella to describe ecologically or biologically significant marine areas (EBSAs) (Druel, 2012a). In addition, the CBD has also contributed to the global discussions with the adoption of voluntary Guidelines for the consideration of biodiversity in environmental impact assessments and strategic environmental assessments annotated specifically

41. For example, on dumping of wastes, see the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter and its 1996 London Protocol.
42. See: http://www.unep.org/regionalseas/programmes/independent/antarctic/default.asp.
43. CBD, Article 1.
44. CBD, Article 4 (b).
45. CBD, Article 5.
46. See CBD Decision X/29 on Marine and Coastal Biodiversity, §24. This has not always been the case. For example, in 2004, the ICP recommended to the UNGA to *"welcome decision VII/28 adopted at the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity suggesting that the Ad Hoc Open-Ended Working Group on Protected Areas explore options for cooperation to promote the establishment of marine protected areas beyond national jurisdiction, consistent with international law, including the United Nations Convention on the Law of the Sea, and on the basis of the best available scientific information, and encourage the participation of oceans experts in the Working Group"* (document A/59/122, Letter dated 29 June 2004 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly, § 5 (b)).

Figure 8. Regional seas organisations with and without a high seas component



Source: Ban *et al.*, 2013.

for biodiversity in ABNJ.[47] So far, the work undertaken through this convention has merely been noted in the UNGA omnibus resolutions on Oceans and the Law of the Sea.[48]

3. CURRENT ISSUES

3.1. The absence of a comprehensive set of overarching governance principles

Governance principles applicable to marine biodiversity in ABNJ exist, but they have not yet been gathered in a dedicated and comprehensive instrument, such as that in Article 5 of the UNFSA which lists the general principles applicable to the conservation and management of straddling fish stocks and of highly migratory fish stocks. Experts have already identified reasons to formulate a comprehensive set of governance principles for ABNJ. *"It would provide an unequivocal reconfirmation that these principles have to be applied to ABNJ. […] A comprehensive set of principles would provide a sound basis for developing a coherent regime for the governance of ABNJ"* (Oude Elferink, 2011). In addition, *"increasing the application of principles in the international decisions processes of treaty bodies is essential for weighing different conservation and use priorities against an overarching ethical framework and resolving conflicts, particularly between treaties"* (Ardron *et al.*, 2013).

3.2. The institutional framework issue

The governance framework for the oceans has often been characterised as fragmented (Tladi, 2011; see section 2.2), with a multitude of international global and regional organisations having a mandate over some regions or some activities in ABNJ. There are gaps in this governance framework: not all human activities in ABNJ are adequately regulated through an international organisation or convention and not all regions are covered by a specific instrument (such as a regional seas convention) dedicated to the protection of the environment or to the conservation of marine biodiversity. In addition, some existing organisations continue to manage activities within their mandate without taking into account modern governance principles such as the ecosystem approach, the precautionary principle or the need to have transparent and open decision-making processes. As a consequence,

47. CBD Decision XI/18 on Marine and Coastal Biodiversity.
48. See for example the last UNGA resolution, Doc. A/Res/67/78 of 11 December 2012, § 189, 196, 197…

there are and will be problems to solve regarding the implementation of integrated or multi-sectoral measures linked to the conservation and sustainable use of marine biodiversity in ABNJ. The establishment of multi-purpose marine protected areas (MPAs) in ABNJ provides a good example (see section 3.3.).

Also linked to the fragmentation of the institutional framework is the difficulty that might be faced by many competent organisations for coordination and cooperation. In some regions, weak frameworks for cooperation exist, which take the form of Memorandums of Understanding (MoUs) or other non legally-binding instruments. This is the case for example in the North-East Atlantic, with an attempt to establish such a framework for the management of the OSPAR MPAs in ABNJ and, at a more formal level, in the Southern Ocean, with CCAMLR and the Antarctic Treaty System (Druel *et al.*, 2012b). But in the vast majority of oceanic regions, coordination and co-operation between competent organisations in ABNJ on marine biodiversity issues are almost non-existent.

3.3. The absence of a global framework to establish MPAs in ABNJ

According to the CBD, a protected area is *"a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives"*.[49] MPAs can be seen as a useful tool to conserve marine biodiversity in ABNJ by providing a higher level of protection to some specific features or habitats. By regulating human activities in the protected area and thus reducing the impacts of multiple stressors, MPAs are also useful in helping ecosystems and species to adapt to the growing impacts of climate change and ocean acidification.

As of 2010, the global coverage of MPAs (including ABNJ and areas within national jurisdiction) represented 1.17% of the oceans, with only a few of them located in ABNJ.[50] The target set by the CBD in 2010 to conserve at least 10 per cent of coastal and marine areas *"through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures"* is therefore far from being realised,[51] and will not be reached without the designation of more MPAs in ABNJ.

There are several reasons that can explain the difficulty in establishing MPAs in ABNJ, as well as some obstacles to their efficient management. Most interested Parties and stakeholders are looking today at the establishment of multi-purpose MPAs, that is to say at the establishment of protected areas which aim at regulating a large variety of human activities with the ultimate objective to conserve marine biodiversity. However, there is currently no global mechanism for the establishment of such multi-purpose or multi-sectoral MPAs. Instead, the prevailing approach today is sector-based. The ISA, for example, designated nine areas in 2012 as *"areas of particular environmental interest"* in the Clarion-Clipperton Zone in the Central Pacific.[52] RFMOs can designate some fisheries closures to protect or restore the stocks they manage, or to protect the vulnerable marine ecosystems (VMEs) located on the seabed. The IMO, which regulates shipping, has the mandate to adopt, through its Parties, measures to regulate navigation in protected areas. The first issue lies therefore in the difficulty to coordinate the efforts of various global and sectoral organisations to establish MPAs and related management measures.

Such a coordination role could have been devoted to the regional seas programmes, but only a few of them apply in ABNJ (see section 2.2.). Furthermore, recent regional initiatives suffer from important limitations, as illustrated in the North-East Atlantic. In this region, a first network of MPAs in ABNJ was established by the OSPAR Commission in 2010. However, this organisation has only a limited mandate to regulate human activities in ABNJ and must therefore seek the cooperation of other international organisations - such as the IMO, the ISA or the North-East Atlantic Fisheries Commission (NEAFC) - to design an appropriate management plan for its MPAs. Cooperation is difficult to achieve: only non-legally binding instruments can be used, and these organisations all have diverging priorities and different memberships. The same issue is raised for the MPAs that the CCAMLR is currently looking to establish in the Southern Ocean, with the slight difference that CCAMLR has the mandate to regulate fishing.

In addition, the measures adopted by regional or sectoral organisations are only binding for their

49. CBD, Article 2.

50. *"From a political perspective, almost all MPAs are located within areas of national jurisdiction and when the high seas are excluded, MPA coverage stands at some 2.88%"* (Toropova *et al.*, 2010).

51. CBD COP 10, Decision X/2, Strategic Plan for Biodiversity 2011/2020, Target 11.

52. See document ISBA/18/C/22 of 26 July 2012, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone.

Contracting Parties. Non-Parties may still undermine the conservation measures adopted through these organisations. It should also be noted that in the context of the UN discussions, some Latin-American States have questioned the legitimacy of the regional instruments to establish and manage MPAs in ABNJ.

3.4. A legal uncertainty surrounding the status of MGRs in ABNJ

A 2008 paper pointed out that there is currently a *"lack of clarity on the applicable regime relating to bioprospecting and equitable use of marine genetic resources (MGRs) in ABNJ"* (Gjerde *et al.*, 2008a). This lack of clarity is mainly due to an ideological divide between States participating in discussions at the global level, under the auspices of the UNGA. MGRs and the regulation of bioprospecting were not included as such in the UNCLOS text since they refer to relatively new concepts linked to activities there were only emerging at the time of the negotiations of the Convention. This leaves States with a certain amount of leeway in the interpretation of its provisions.

Developing countries speaking through the G77/China have supported the application of the common heritage of mankind principle to MGRs found in the Area. Drawing a parallel with mineral resources of the deep-seabed, they have argued for an extension of the role of the ISA to the management of these resources and for the establishment of a benefit-sharing mechanism which could be inspired by the one found in UNCLOS with respect to the exploitation of the continental shelf beyond 200 nautical miles.[53] On the other hand, the US and some other developed countries have argued that the freedom of the high seas principle found in Part VII of UNCLOS applies to MGRs in ABNJ. As a consequence, access to these resources should be free and, as the common heritage of mankind principle would not be applicable, there should be no benefit-sharing obligation. The EU has an intermediary position in this debate. It does not recognise that MGRs in the Area fall under the common heritage of mankind principle but has stated several times that a "first come, first served principle" would not be an acceptable solution and was open to an approach based on equitable principles.

In 2010, Parties to the CBD adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity. Through this instrument, the Parties are seeking to establish international rules on *"fair and equitable sharing of the benefits arising from the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies and by appropriate funding"*.[54] But *"the starting point for ABS in ABNJ is that it does not fall under the scope of the Nagoya Protocol"* (Greiber *et al.*, 2012). There have been some discussions during the negotiations on whether Article 10 of the Nagoya Protocol on a global multilateral benefit-sharing mechanism could encompass in its scope MGRs found in ABNJ. Article 10 opens the possibility for Parties to create a global multilateral benefit-sharing mechanism for genetic resources obtained in transboundary situations *"or for which it is not possible to grant or obtain prior informed consent"*.[55] The general view among States participating in discussions both in the CBD and UNGA contexts is that the access and benefit-sharing (ABS) issue for MGRs in ABNJ should be resolved under the UNCLOS umbrella. Nevertheless, *"Article 10 of the Protocol leaves open the possibility for the future negotiation of a multilateral benefit-sharing mechanism, which could, if States so chose, provide the basis for future benefit-sharing arrangement in regards of marine genetic resources from areas beyond national jurisdiction"* (Vierros *et al.*, 2013).

The adoption of the Nagoya Protocol in 2010 sheds more light on the lack of clarity or, as some States would say, on the lack of specific regulation applicable to ABS for MGRs in ABNJ. Once the Nagoya Protocol enters into force, this would result in a difficult situation where a company wishing to avoid its obligations linked to the exploitation of MGRs within national jurisdiction could claim that the resources concerned come from ABNJ.

The exact nature of bioprospecting and whether it could fall under the existing UNCLOS regime for marine scientific research[56] has also been debated within the UNGA, as well as the questions of the traceability of MGRs and other intellectual property rights issues.[57]

53. UNCLOS, Article 82. See notably its §4: *"the payments or contributions shall be made through the Authority* [the ISA]*, which shall distribute them to State Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them"*.

54. Nagoya Protocol, Article 1.

55. Nagoya Protocol, Article 10.

56. See UNCLOS, Part XIII, in addition to Article 87 and 143 of the same Convention.

57. For an overview of these issues, see Greiber *et al.*, 2013.

3.5. The lack of global rules for EIAs[58] and SEAs[59] in ABNJ

UNCLOS provides for a general obligation to carry out 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"*.[60] But this requirement has been sparsely and poorly implemented and some important gaps remain. Two reasons for this poor implementation could be the lack of details provided by UNCLOS with respect to the minimum standards that would need to be fulfilled by an EIA for it to be considered as appropriate and the lack of reporting mechanisms despite UNCLOS requirements for publication or reporting to the competent international organisations.[61]

Only a few sectoral intergovernmental organisations have developed specific requirements to conduct EIAs for human activities in ABNJ, these include: several RFMOs for deep-sea bottom fisheries, the ISA for the exploration of seabed mining in the Area, and the Contracting Parties to the London Convention and its Protocol for the dumping of wastes and ocean fertilisation.[62] At the regional level, this requirement has been developed in the context of the Antarctic Treaty System in the Southern Ocean for all activities having at least the potential for a minor or transitory impact and to a much lesser extent by the OSPAR Commission. There is therefore no requirement to carry out prior EIAs for a wide range of activities such as *"seabed activities other than mining, (e.g. cable and pipelines, seabed installations, marine scientific research, bioprospecting, sea-based tourism); high seas activities other than dumping and some fishing (e.g. shipping, marine scientific research, floating installations (e.g. wave, nuclear, CO_2 mixers)); impacts of high seas fishing activities on outer continental shelves of coastal nations (e.g. deep-sea fishing impacts on sedentary species and resources, vulnerable benthic ecosystems); impacts of outer continental shelf activities on high seas (e.g. seismic testing noise); military activities; new or emerging uses of the seas"* (Gjerde *et al.,* 2008a).

In addition, there is currently (i) no global requirement to assess the impact of individual activities in the context of the cumulative impacts of human activities in ABNJ and no mechanism to undertake or help to undertake such assessment; (ii) no global requirement to carry out SEAs; (iii) no global competent authority to monitor the implementation by States and international organisations of their duty to carry out EIAs in ABNJ; (iv) no mechanism to allow for public consultation and participation during the EIAs and SEAs processes.

3.6. The difficulty to build capacity and to transfer marine technologies

One particular sector where capacity-building and the transfer of marine technology can benefit developing countries is marine scientific research, including with respect to MGRs and bioprospecting. Research on MGRs is an area where the gap between developed and developing countries is particularly huge. According to a 2011 study, 10 countries own 90% of the patents associated with a gene of marine origin (whether from national jurisdiction or beyond) and these countries are all developed ones[63] (Arnaud-Haond *et al.*, 2011). Many factors could reasonably explain this gap, including the difficulty to have access to rather expensive technologies, the lack of adequate training or the lack of access to relevant information and data. Recently, for example, experts have shown that only a few countries own research vessels over 60 metres in length, the type that are required for expeditions in ABNJ.[64]

Therefore, many developing States propose capacity-building and the transfer of marine technology as necessary means for bridging this gap. UNCLOS has an entire chapter, Part XIV, dedicated

58. EIAs are defined by the CBD as *"a process of evaluating the likely environmental impacts of a proposed project or development taking into account inter-related socio-economic, cultural and human health impacts, both beneficial and adverse"*. See Voluntary Guidelines on biodiversity-inclusive impact assessment, §5, Annex to CBD COP 8 Decision VIII/28.

59. SEAs are *"the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying-out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme"*. See Article 2 (6) of the Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context.

60. UNCLOS, Article 206.

61. UNCLOS, Article 205.

62. 1972 London Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter and its 1996 Protocol.

63. These countries are the US, Germany, Japan, France, the UK, Denmark, Belgium, the Netherlands, Switzerland and Norway.

64. See the presentation by Kim Juniper during the intersessional workshop on marine genetic resources held on 2 and 3 May 2013 in New York, available at: http://www.un.org/Depts/los/biodiversityworkinggroup/workshop1_juniper.pdf.

to the development and transfer of marine technology. According to Article 268 of this chapter, States shall promote:

"(a) the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data;

(b) the development of appropriate marine technology;

(c) the development of the necessary technological infrastructure to facilitate the transfer of marine technology;

(d) the development of human resources through training and education of nationals of developing States and countries and especially the nationals of the least developed among them;

(e) international cooperation at all levels, particularly at the regional, subregional and bilateral levels".

This section also contains detailed provisions on how to achieve these objectives, most notably through international cooperation[65] and the establishment of national and regional marine scientific and technological centres. These provisions were complemented in 2003 by the adoption of the IOC Criteria and Guidelines on the Transfer of Marine Technology. A number of tools are therefore at the disposal of States and international organisations wishing to engage in capacity building and the transfer of marine technology; but progress appears to be slow. The 11th meeting of ICP in 2010 was devoted to "Capacity-building in ocean affairs and the law of the sea, including marine science". Here it was noted by several delegations *"that the transfer of marine technology was essential for capacity-building in particular in marine science. They further noted that, in their view, Part XIV of the Convention was the part with the greatest gap in implementation".*[66]

3.7. High seas fishing

In general, the state of world fisheries is a source of major concern at the global level. According to the FAO, almost 30% of the fish stocks it monitors were overexploited in 2012, 57% were fully exploited and only 13% non-fully exploited (FAO, 2012). The same year, the FAO noted that *"the situation seems more critical for some highly migratory, straddling and other fishery resources that are exploited solely or partially in the high seas"* (FAO, 2012). Here, there are two different issues to take into consideration when discussing the problems of high seas fishing:

- The specificity of deep-sea fisheries. Deep-sea fishes only represent a fraction of the total amount of catches made in the high seas, but their commercial exploitation generates an intensive debate, due to concerns about the destruction of vulnerable marine ecosystems and about the sustainability of deep-sea fishing. The species exploited are mostly long-lived, with slow reproduction rates and their exploitation also generates considerable amounts of by-catches. For example, some scientists have already noted that *"deep-sea fisheries exaggerate a general feature of marine fisheries, the pernicious disconnect between the natural spatiotemporal patterns of productivity of stocks and the perceived need for continuous high catches that has fuelled the growth of the global fishing enterprise by serially depleting fish stocks. The serial collapses that took 50 years in coastal marine fisheries takes only 5-10 years in the deep-sea. These fisheries also often rely extensively on bottom trawling, and a sustainable combination of low catches with limited ecosystem impact is a difficult, almost impossible, balance to achieve"* (Norse *et al.,* 2012).
- The current governance problems. In ABNJ, fisheries management relies primarily on two different types of entities: the flag State, for vessels flying its flag and authorised to fish in the high seas, and RFMOs, through which conservation and management measures are adopted. With regards to the flag State, the absence of a clear definition of the genuine link (see section 3.8.) has facilitated the development of so-called "flags of convenience" and ultimately the widespread practice of IUU fishing.[67] On the other hand, RFMOs, through which States should cooperate for the management of fisheries resources, also encounter numerous governance problems. A 2010 study highlighted that when it comes to conservation, *"RFMOs have failed. It is evident from the results here that the priority of RFMOs – or at least of their member countries – has been first and foremost to guide the exploitation of fish stocks. While conservation is part of nearly all their mandates, they have yet to demonstrate a genuine commitment to it on the water"* (Cullis Suzuki and Pauly, 2010). In addition, several

65. UNCLOS also mentions the special role of the ISA in this respect in its Articles 273 and 274.

66. See document A/65/164, Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eleventh meeting, §28.

67. *"There is a clear and compelling link between IUU fishing on the high seas and fishing vessels flagged to what are commonly called open registers"* (High Seas Task Force, 2006).

parts of the oceans (in the Arctic, the Atlantic, the Pacific and the Indian Oceans) are not yet covered by a RFMO and not all species are managed through these organisations.

3.8. The genuine link issue

The issue of the genuine link is related to the freedom of navigation which, according to UNCLOS, is one of the freedoms of the high seas.[68] According to the Convention, *"every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas"*[69] under the condition that *"there must exist a genuine link between the State and the ship"*.[70] However, UNCLOS does not define in precise terms what is meant by "genuine link". In the absence of detailed requirements on the conditions to attribute a nationality (a flag) to a ship, the old practice of "open registries" or "flags of convenience" continued to flourish after the adoption of UNCLOS.

This issue directly affects marine biodiversity in ABNJ. Through the flag of convenience system, it is very easy to register a vessel which does not adhere to the environmental and safety standards set up by the IMO. It is therefore more likely that these vessels will be involved in pollution incidents on the high seas. Such a vessel can engage in activities in the high seas such as ocean fertilisation, free from any controls imposed by responsible flag States. In addition, the whole flags of convenience system contributes significantly to IUU fishing, as very often there is no effective monitoring, control and surveillance over these vessels.

Conscious of the problem, in 1986 States adopted a United Nations Convention on conditions for registration of ships, which developed stricter rules for the registration of ships under a given flag. But this convention never entered into force.[71] Beyond the genuine link issue, the question of the effective control of States over their nationals (companies, individuals, ships) in ABNJ is gaining an increasing importance, as evidenced for example by:

- The establishment by the IMO of a sub-committee on flag State Implementation and of a voluntary IMO Member State Audit Scheme transitioning to a mandatory audit scheme;
- Work underway within the FAO on the establishment of a global record of fishing vessels;
- The Advisory Opinion delivered in 2011 by the International Tribunal on the Law of the Sea (ITLOS) on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.[72]

68. UNCLOS, Article 87.
69. UNCLOS, Article 90.
70. UNCLOS, Article 91 (1).
71. The Convention only has 15 Contracting Parties, none of them being a major maritime nation.

4. DISCUSSIONS AT THE GLOBAL POLITICAL LEVEL: THE UNGA AND ITS BBNJ WORKING GROUP

4.1. The UNGA as the global political arena

Although marine biodiversity in ABNJ can be discussed in various arenas on a sectoral or issue basis, there is only one global political arena which has received the clear mandate to consider the question as a whole: the UNGA.[73] This central role is often emphasised in UNGA resolutions on Oceans and the Law of the Sea[74] and is also recognised by other international fora. For example a CBD Decision underlines *"the United Nations General Assembly's central role in addressing issues relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction"*.[75]

There are two main reasons for the UNGA's central role. The first one is the universal character of this Assembly which, with 193 Members, has the sufficient representative legitimacy to discuss such a global issue. Secondly, discussions related to the Law of the Sea, and in particular related to UNCLOS and its implementation, have historically been held under the auspices of the UNGA, supported by a special division of the UN Office of Legal Affairs, the Division for Ocean Affairs and the Law of the Sea (DOALOS), which serves as the UNCLOS Secretariat.

Even if the UNGA gathers 193 Members, UNCLOS has not reached the same level of universal participation, with "only" 165 States Parties (some of the most notable exceptions being Colombia, Peru, Turkey, the US and Venezuela). The 1994 UNCLOS Agreement on Part XI has currently 144

72. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Case n°17, 1 February 2011.
73. There are still a very few divergent voices, such as Venezuela, which consider that this question should be brought to another forum - the CBD.
74. For example, in § 180 of resolution A/RES/67/78 of 11 December 2012, the UNGA *"reaffirms its central role relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction"*.
75. CBD Decision X/29 on Marine and Coastal Biodiversity, § 21.

States Parties, while the 1995 UNFSA has 80. One interesting point is that being a Party to UNCLOS is not obligatory to become a Party to the UNFSA.[76] It is also important to underline that non-Parties do not necessarily oppose all the provisions of UNCLOS and the choice of the UNGA as the forum to discuss Oceans and the Law of the Sea issues. The US, for example, considers the majority of UNCLOS provisions to be customary international law and thus actively participates in the discussions. In fact, a State does not need to be a Party to UNCLOS to participate in the discussions held within the UNGA framework on Oceans and the Law of the Sea.

It is within the framework of a dedicated 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 (the BBNJ Working Group), established in 2004,[77] that States discuss the future of the governance of marine biodiversity in ABNJ.

4.2. What is at stake at the BBNJ Working Group? Addressing regulatory and governance gaps[78] versus improving the implementation of existing instruments

In international discussions on the governance of marine biodiversity in ABNJ, the existence of regulatory and governance gaps in the current system is frequently flagged up as the major issue by a majority of States, while other countries claim that problems could be solved simply by improving the implementation of existing instruments.

It is true that the many threats facing marine biodiversity in ABNJ are amplified by the poor implementation of some of the existing instruments. Fisheries are one example. Participation by fishing States in RFMOs is not always complete and the measures adopted by these organisations are not always sufficient to ensure the sustainability of stocks. Biodiversity conservation by way of reducing bycatch of vulnerable species or establishing closed areas for biodiversity conservation remain a low priority on most RFMOs agendas (other than those RFMOs spurred into action via a series of UNGA resolutions on deep-sea bottom fishing). This is also true in other sectors. The IMO, for example, has adopted a series of texts which establish some tools to protect the marine environment from the impacts of shipping in all oceans,[79] but which have had little effect on the high seas until now. The general conclusion is that many States and international organisations have failed to *"adequately implement and enforce existing obligations such as the general obligation for States to cooperate in the protection and preservation of the marine environment"*, a duty found in UNCLOS.[80] However, a better implementation of existing instruments would also be easier if regulatory and governance gaps were filled with the adoption of an UNCLOS IA.

The existence of regulatory and governance gaps has been repeatedly noted. The failure in the implementation of other instruments over a period of decades is not a justification for the failure to address other gaps. Among the regulatory gaps, it is worth mentioning:

" - The lack of specific requirements for modern conservation tools such as environmental impact assessments (EIAs), monitoring and reporting, area-based measures, networks of representative marine protected areas (MPAs), strategic environmental assessments (SEAs), and marine spatial planning to apply to the full range of ocean-based human activities in or having an effect on ABNJ;

- The absence of legally binding instruments in all ocean regions to provide integrated coverage at the regional level for fisheries and biodiversity conservation;

- The lack of rules or a process to coordinate regulation of interactions between activities occurring in the high seas water column and those occurring on the extended continental shelf of coastal States" (Gjerde *et al.*, 2008a).

As for the governance gaps, they include inter alia:

" - The absence of mechanisms to ensure coordination and cooperation within and across sectors, States and institutions;

- The lack of an institution or process to oversee and assist where necessary the application of modern conservation principles and management tools to all human activities;

- The absence of an institution or mechanism to

76. The US, for example, is not a Party to UNCLOS but is Party to the UNFSA.

77. UNGA resolution 59/24 of 17 November 2004, §73.

78. The International Union for Conservation of Nature (IUCN) defines the regulatory gaps as *"substantive and/or geographical gaps in the international legal framework, i.e. issues which are currently unregulated or insufficiently regulated at a global, regional or sub-regional framework"* and governance gaps as *"gaps in the international institutional framework, including the absence of institutions or mechanisms at a global, regional or sub-regional level and inconsistent mandates of existing organisations and mechanisms"* (see Gjerde *et al.*, 2008a).

79. For example, it is possible to establish a Particularly Sensitive Sea Area (PSSA) in the high seas. This has not been done yet (see Roberts *et al.*, 2010).

80. UNCLOS, Article 192.

assess existing and emerging uses of the oceans, in terms of the obligation to protect and preserve the marine environment and conserve and manage its biodiversity;

- Lack of clarity on the applicable regime relating to bio-prospecting and equitable use of marine genetic resources (MGR) in ABNJ" (Gjerde *et al.*, 2008a).

The existence and nature of these regulatory and governance gaps is the core subject of the discussions held in the BBNJ Working Group.

4.3. A brief history of the BBNJ Working Group

According to the Charter of the United Nations, *"the General Assembly may establish such subsidiary organs as it seems necessary for the performance of its functions"*.[81] Subsidiary organs of the UNGA, such as the BBNJ Working Group, may *"present their recommendations, usually in the form of draft resolutions and decisions, to a plenary meeting of the Assembly for its consideration"*.[82]

The original mandate of the Working Group was: *"(a) to survey the past and present activities of the United Nations and other relevant international organisations with regard to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction; (b) to examine the scientific, technical, economic, legal, environmental, socio-economic and other aspects of these issues; (c) to identify key issues and questions where more detailed background studies would facilitate consideration by States of these issues; (d) to indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction"*.[83] Importantly, the original mandate of the Working Group did not include the possibility to make recommendations to the UNGA.

4.3.1. The 2006 and 2008 sessions: ideological divide and status quo

The BBNJ Working Group subsequently met in 2006 and 2008 without achieving any significant outcomes. One of the reasons was the ideological divide which appeared during the first meeting of the Working Group on the question of the legal status of the marine genetic resources (MGRs) found in the Area. Unsurprisingly, this ideological divide was based largely on a North/South fracture line.

Since the establishment of the BBNJ Working Group, countries from the G77/China have advocated the application of the common heritage of mankind principle to MGRs found in the Area. This position is based on a 1970 UNGA resolution regarding the principles governing the seabed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction.[84] According to this resolution, *"the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the Area), as well as the resources of the Area, are the common heritage of mankind"* and *"the exploitation of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole"*. The text of the resolution itself does not define what is meant by "resources", neither does it explicitly exclude some specific resources from its scope. As a result, the G77/China considers that it applies to all the resources of the Area, including MGRs. For that reason, these countries have argued that, as the common heritage of mankind principle applies to the MGRs, benefits arising from their exploitation should be shared between all countries.

UNCLOS itself is silent regarding the legal regime applicable to MGRs in the Area. Its Preamble recalls the 1970 UNGA resolution and affirms the desire of States Parties to the Convention to develop the principles embodied in this resolution. But UNCLOS further states that the resources located in the Area to which the common heritage of mankind principle applies are *"all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules"*.[85] Some developed countries have used this argument to state that MGRs in the Area do not fall under the common heritage of mankind regime developed in Part XI of UNCLOS, but rather on the freedom of the high seas regime developed in Part VII of the same convention. For several years, these positions remained deeply entrenched and it seemed impossible that this blockage in the BBNJ Working Group could ever be overcome due to such divergent views.

81. Article 22 of the Charter of the United Nations.
82. See : http://www.un.org/en/ga/about/subsidiary/index.shtml.
83. UNGA resolution 59/24 of 17 November 2004, §73.
84. UNGA resolution 2749 (XXV) of 12 December 1970.
85. UNCLOS, Article 133 (a). When reading these articles, it is important to bear in mind that, at the times when UNCLOS was drafted, MGRs were not really considered as being one of the potential resources of the Area. The historical focus of the Convention was on polymetallic nodules, which were thought to be a future source of wealth, and it was not envisaged that bioprospecting in ABNJ might become a possibly lucrative activity in future.

However, it may simply be that MGRs were not an issue in the Third Conference on the Law of the Sea and thus UNCLOS does not address them.

Other States maintained their focus on issues such as the application of the precautionary approach and the establishment of marine protected areas (MPAs) in ABNJ. As early as 2006, recognising that a regulatory gap existed in UNCLOS with respect to the protection of marine biodiversity in ABNJ, the EU called for the adoption of an UNCLOS IA.[86] At that time, this call was only supported by a few NGOs and did not receive the support of many States participating in the discussions within the BBNJ Working Group.

4.3.2. The 2010 and 2011 sessions: towards the "package deal"

In 2010, for the first time, the BBNJ Working Group was invited to make recommendations to the UNGA.[87] The Working Group has met on an annual basis since then. During that 2010 meeting, a number of proposals were made by States to advance the conservation and sustainable use of marine biodiversity in ABNJ. This included inter alia: (i) the proposal to develop an UNCLOS IA; (ii) the adoption of modern management principles through, for example, a UNGA resolution; (iii) the adoption of a UNGA resolution on environmental impact assessments (EIAs) for all human activities that may have significant adverse impacts on marine biodiversity in ABNJ; and (iv) the establishment of a standard model for regional cooperation through a memorandum of understanding for MPAs designation in ABNJ. But, as the recommendations of the BBNJ Working Group have to be adopted by consensus and as all States could not agree on these proposals, they were not reflected in the final outcome.

Things moved significantly in 2011. That year, discussions were almost entirely devoted to the need for an UNCLOS Implementing Agreement on the conservation and sustainable use of marine biodiversity in ABNJ. For the first time, the EU and the G77/China (with the addition of Mexico) found a common position on the subject. They agreed to push for the establishment of an intergovernmental negotiating process which would address, as a "package", MGRs, MPAs, EIAs, capacity-building and the transfer of marine technology. The idea of having a number of issues that could be considered as a package, which would be the subject of future negotiations, derives from the history of the negotiations of UNCLOS itself, during which such a process was used. A "package deal" means that participants in a negotiation accept the *"resolution of a particular issue or issues, despite shortcomings, because of the relatively favourable disposition of another issue or issues, not necessarily directly related"* (MacDougal and Burke, 1987).[88] It also parallels the development of the CBD which addresses both conservation and sustainable use and includes equitable benefit-sharing of genetic resources. The opening of the negotiations for a new UNCLOS IA was not retained in the final recommendations of the Working Group, mainly because of the opposition of a few countries such as the US, Canada, Japan, Iceland and the Russian Federation. But it was agreed that *"a process be initiated, by the General Assembly, 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 forward, 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. (…) This process would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology"*.[89] This was a very significant advance which fundamentally shifted the negotiation framework. Another important decision was taken, at the suggestion of Australia, which was to hold intersessional workshops aimed at improving the understanding of issues and clarifying key questions.

86. See EU Presidency statement of 13 February 2006 at: http://www.eu-un.europa.eu/articles/en/article_5691_en.htm.
87. See UNGA resolution 64/71 of 4 December 2009, § 146.
88. The decision to adopt a package deal approach for the negotiations of UNCLOS was taken *"because different States displayed extremely divergent attitudes to issues under consideration"*. Therefore, *"successful negotiations on all major problems required the adoption of a "package deal" approach as a special technique of trade-offs between different areas of bargaining. Generally, a "package deal" solution implies that 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"*, an idea often summarised in the sentence "nothing is agreed until everything is agreed" (Danilenko, 1993).
89. 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).

4.3.3. The 2012 session: avoiding progress

The 2011 BBNJ meeting was an important step forward, but the 2012 meeting reminded observers that there was still a long way to go before negotiations for an UNCLOS IA could actually begin. In 2011, States agreed in the recommendations made to the UNGA that the process should take place in the framework of the BBNJ Working Group and *"in the format of intersessional workshops aimed at improving understanding of the issues and clarifying key questions as an input to the work of the Working Group"*.[90] In 2012, most of the discussions focused on the preparation of the intersessional workshops, leaving aside the issue of the legal framework. As a result, the final recommendations mostly discuss the practical organisation of two workshops before the 2013 meeting of the BBNJ Working Group.[91] The only other concrete point was the request to the BBNJ Working Group to provide recommendations to the UNGA in 2013 for making progress on ways to fulfil its mandate.

Explicit discussions on launching negotiations on an UNCLOS IA instead took place in the preparatory meetings to the 2012 United Nations Conference on Sustainable Development or "Rio + 20" and were one of the most hotly debated topics up to the end of the conference. The first "zero draft" of the outcome document included a paragraph explicitly calling for the launch of the negotiations of an implementing agreement as soon as possible.[92] During Rio + 20, many States, including the EU, were hoping that a political consensus could be reached between Heads of States and Governments to open the negotiations for the conclusion of a new UNCLOS IA. The idea to discuss this proposal in this particular forum was not totally unheralded; a precedent had been set by the political agreement reached during the first Rio Conference in 1992 to call for an intergovernmental United Nations conference on highly migratory fish stocks and straddling fish stocks, which resulted in the UNFSA. But, as a few States such as the US, Russia and Venezuela could not agree to this proposal, the necessary consensus was not reached. Instead, a commitment was made to address, on an urgent basis, the issue of the conservation and sustainable use of marine biodiversity in ABNJ, including by taking a decision on the development of an international instrument under UNCLOS. A deadline was agreed, according to which a decision on the development of an UNCLOS IA should be taken before the end of the 69th session of the UNGA, or by August 2015.

4.3.4. To be continued in 2013, 2014 and 2015

In 2013, discussions continued, in the framework of two intersessional workshops, the first on 2-3 May 2013 on MGRs and the second on 6-7 May 2013 on conservation and management tools, including area-based management tools and EIAs.[93] Although the main value of the workshops was in the information they provided to negotiators on these two topics, they were also an opportunity for States to reaffirm some of their positions and to hold informal discussions in the margins of these meetings. The next BBNJ Working Group will be held on 19-23 August 2013 in New York.

During the 6th meeting of the BBNJ Working Group, which took place in New York (United States) from 19-23 August 2013, States focused their discussions more on procedural rather than substantive issues; this happened in 2012 already. The possibility given by the Rio+20 declaration to open the negotiations for the conclusion of an UNCLOS IA in 2013 rather than in 2014 or 2015 was not mentioned. Discussions concentrated rather on the establishment of a process which would allow States to take a decision regarding the launch of the negotiations before the end of the 69th session of the UNGA. To this end, States drew inspiration from the discussions which took place before the launch of the negotiations for the adoption of the Arms Trade Treaty. They agreed to recommend to the UNGA that, in the framework of the BBNJ Working Group, at least three meetings of four days each take place to discuss the scope, parameters and feasibility of an international instrument under UNCLOS. Through the recommendations, States are also invited to submit their views on these three elements before the next meeting of the BBNJ Working Group, which will take place on 1-4 April 2014. The other working group meetings will be held in 17-20 June 2014 and 20-23 January 2015.

90. 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 (c).

91. See document A/67/95, Letter dated 8 June 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly.

92. Paragraph 80 of the zero draft presented on 10 January 2012 provided: *"We note the establishment by the UN General Assembly of an 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, and we agree to initiate, as soon as possible, the negotiation of an implementing agreement to UNCLOS that would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction"* – see http://www.uncsd2012.org/rio20/index.php? menu=144.

93. For an overview of the presentations delivered during the workshops, see: http://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm.

5. AN ANALYSIS OF STATE POSITIONS IN INTERNATIONAL TALKS ON THE GOVERNANCE OF BIODIVERSITY IN ABNJ

5.1. The EU or how to compromise to establish MPAs in ABNJ[94]

Since the beginning of the discussions at the BBNJ Working Group, the EU has been promoting the idea of an UNCLOS IA, and its proposals in this respect have evolved over time. In 2006, the EU first considered that an UNCLOS IA should focus on:

"(i) An integrated and precautionary based approach to the management of biodiversity protection and conservation, including through MPAs (…) whilst recognising to be coherent with and respecting existing mandates and competencies of international organisations (…);

(ii) Cooperation and coordination between existing regulatory frameworks and bodies that are competent to exercise their respective mandates to regulate activities under their responsibilities (…);

(iii) (…) The establishment of a representative and integrated network of marine protected areas within and beyond the limits of national jurisdiction to protect vulnerable marine ecosystems (…);

(iv) Identification of vulnerable ecosystems and species in marine areas beyond the limits of national jurisdiction".[95]

If this original proposal is compared with the actual package adopted in 2011, several elements are missing, including: MGRs and the question of benefit sharing, EIAs, capacity-building and the transfer of marine technology.

The EU has first and foremost supported the inclusion of the topic of MPAs in the discussions. The EU and its Member States are parties to a number of regional agreements, within which the establishment of MPAs in ABNJ have progressively become a major issue. Within the frameworks of the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic and of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR Convention), efforts are currently underway to establish networks of MPAs in ABNJ. The actual management of these MPAs is however impeded by important issues, the first of which being the absence of international recognition for these regional MPAs, their subsequent non-enforceability to third Parties and the difficulty to coordinate and cooperate with other competent organisations to adopt management measures (Druel *et al.*, 2012b). In the OSPAR and CCAMLR contexts, the EU and its Member States have actively supported the establishment of these regional networks and, as a consequence, are seeking to obtain international recognition for these existing MPAs through the UNCLOS IA.

In regard to MGRs, the position of the EU has evolved. While on several occasions the EU has indicated that MGRs in the Area are not embodied in the common heritage of mankind principle and that they fall outside of the scope of the ISA,[96] it has not been opposed to discussions on this topic and has even proposed to discuss voluntary guidelines or codes of conduct, with the aim of improving the environmental management of MGRs.[97] In 2008, the EU realised that it would be difficult to gain widespread support for an UNCLOS IA without making concrete proposals on the MGR issue. It therefore suggested several approaches, including (i) the development of international guidance on the use of impact assessment on MGRs in ABNJ; (ii) the sharing of information and knowledge resulting from research on MGRs collected in ABNJ and the increased participation of researchers from developing countries in relevant research projects; (iii) the possible establishment of a multilateral system for MGRs in ABNJ, inspired by the one set up in the context of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, which would facilitate access to MGR samples and sharing of benefits.[98] In 2010, it went further and proposed the integration into a potential UNCLOS IA the question of fair and equitable benefit-sharing for MGRs in ABNJ.[99]

Since 2011 and the compromise reached with the G77/ China and Mexico, the EU has supported the view that the establishment of an access and benefit-sharing (ABS) regime for MGRs in ABNJ should be considered. Whilst obviously not ready to consider the idea that the common heritage of

94. New Zealand and Australia do not share the exact same views as the EU but are generally supportive of the need for conservation measures in ABNJ.

95. See EU Presidency statement of 13 February 2006 at: http://www.eu-un.europa.eu/articles/en/article_5691_en.htm.

96. See for example the EU Presidency Statement – Working Group on Marine Biodiversity – Agenda item 5 c (15 February 2006), at: http://www.eu-un.europa.eu/articles/en/article_5705_en.htm.

97. See the EU Presidency Statement – Working Group on Marine Biodiversity – Agenda item 5 c (15 February 2006) at: http://www.eu-un.europa.eu/articles/en/article_5705_en.htm.

98. EU Presidency Statement – United Nations Sixth Committee: Agenda item 5 (d) – Genetic resources beyond areas of national jurisdiction, at: http://www.eu-un.europa.eu/articles/en/article_7847_en.htm.

99. See http://www.iisd.ca/oceans/marinebiodiv3/brief/brief_marinebiodiv3.html, p.5.

mankind principle should be applied to MGRs in the Area, the EU however agrees that a "first come, first served" approach "*is counterproductive*".[100] It has also agreed to include in the package the issue of capacity-building and the transfer of marine technology, which is linked to the MGR discussion, as most developing countries do not benefit from the technology and human expertise necessary to carry out research on the genetic resources found in ABNJ. In 2012, it stated that the elements of the package should be the building blocks of a future UNCLOS IA.[101]

The gradual evolution of the EU position was crucial in securing the 2011 compromise with the G77/China. However, it should not be taken for granted that the EU will always speak with a unified voice on this subject in the upcoming years. Just ten countries own 90% of the patents associated with genes of marine origin (Arnaud-Haond *et al.,* 2011). Among this top ten are several EU countries, including Germany, France, the UK, Denmark, Belgium and the Netherlands. With economic interests at stake, it is likely that European industries will at some point in any future negotiations seek to play a role in trying to prevent an excessive regulation of their activities.

At the very beginning of the discussions, EIAs and other related tools such as SEAs and the assessments of cumulative impacts of human activities on the marine environment were not included in the proposals made by the EU on the possible content of an UNCLOS IA. Indeed, the EU, recognising that a gap existed in the current legal framework, was keen to address this issue through so-called "short-term actions" (the medium term action being the adoption of the UNCLOS IA). In 2008, it indicated that *"environmental impact assessment (EIA) and strategic environmental assessment (SEA) can help to assess and control human impacts on marine biodiversity in ABNJ by defining a procedure for determining the extent of (cumulative) impacts on marine biodiversity in ABNJ as a result of a (number of) human activity (ies), and by establishing criteria according to which such activities are allowed to proceed"*.[102] It further proposed to develop guidelines, either through the BBNJ Working Group or through the CBD, *"for the implementation of EIA/SEA for activities which have a potential to adversely impact marine biodiversity beyond national jurisdiction, including the requirement for prior notification of such planned activities"*. The EU also suggested the establishment of a mechanism/system which would provide for, inter alia, regular assessments of the state of the marine environment and give advice with respect to the individual and cumulative impacts of human activities and emerging threats.[103] In 2010, the EU proposed *"as an immediate measure the adoption of a General Assembly resolution on implementation of EIAs, incorporating a general process similar to that established for bottom fisheries by resolution 61/105 to assess whether human activities have significant negative impacts on marine biodiversity in ABNJ, subject to periodic review"*.[104] In the same year, it also highlighted the need to develop a common methodology for carrying out EIAs at the regional and sectoral levels.

All these proposals disappeared from EU statements in 2011 and 2012. Furthermore, short-term measures related to EIAs were not the only ones to be absent from EU statements during these two years. Immediate measures that were also dropped included: (i) the establishment of multi-purpose pilot MPAs; (ii) the development of a standard model for regional cooperation through a memorandum of understanding for MPA designation in ABNJ; (iii) the extension of the geographical coverage and mandate of RFMOs and regional seas conventions; (iv) the adoption of overarching governance principles; (v) the joint development of research cruises, including with participants from developing countries and (vi) the establishment of a UN programme of cooperation in the development and transfer of marine technology to be applied on a regional level. It was the 2011 compromise with G77/China and Mexico that caused

100. See EU Presidency Statement – Working Group on Marine Biodiversity – Agenda item 4 (1 June 2011).

101. See EU Presidency Statement – Working Group on Marine Biodiversity – Agenda item 4 (7 May 2012).

102. EU Presidency Statement – BBNJ Working Group – Agenda item 5 (a) (28 April 2008), at: http://www.eu-un.europa.eu/articles/en/article_7846_en.htm. It is only partially correct to state that EIAs and SEAs will help to assess the cumulative impacts of human activities in ABNJ. EIAs, which address the impacts of a given activity, and SEAs, which address the impacts of a policy or a plan, are currently sector-based. They can take into account the impacts of other activities if explicitly required but, as a result of this sectoral organisation, will be unable to regulate these impacts. This important gap was implicitly recognised in the same statement, when the EU indicated the need for a mechanism/system to provide for *"timely advice with respect to the individual and cumulative impacts of human activities and emerging threats, including through providing the expertise for review of EIAs/SEAs"*.

103. *Ibid*. Voluntary guidelines for the consideration of biodiversity in environmental impact assessments annotated specifically for biodiversity in marine and coastal areas, including in ABNJ, were adopted by the Conference of the Parties to the CBD in 2012 (CBD COP 11, Decision XI/18 on Marine and Coastal Biodiversity). These guidelines are limited to a certain amount of technical and scientific advice and do not provide guidance on legal and governance issues (see Druel, 2013).

104. See: http://www.iisd.ca/oceans/marinebiodiv3/, p.4.

these disappearances. There is an understanding that, as all issues are now considered as a package, the international community needs to advance at the same pace to solve them all. It is a matter of trust and confidence building between the EU and the G77/China. As was noted in a report of the 2011 meeting of the BBNJ Working Group, *"unlike its 2010 standpoint, the EU also refrained from advocating for a fast-lane for conservation tools. That is, the EU avoided requesting work on EIAs and MPAs as a short-term measure, while leaving for later consideration the question of the legal regime on MGRs as a long-term measure"*.[105] As a result, EIAs are included as a specific topic in the package and will not be discussed elsewhere.

The same analysis also applies to capacity building and the transfer of marine technology. In the early years of the BBNJ Working Group, the EU made several proposals which were mostly short-term measures. This included the participation of scientists from developing countries in relevant research projects, the establishment of a UN programme of cooperation in the development and transfer of marine technology to be applied on a regional level, specific training for EIAs, MPAs, climate change mitigation and adaptation, and support for research activities in areas of interest for developing countries.

5.2. The G77/China: overcoming the common heritage of mankind debate to establish an ABS regime for MGRs in ABNJ[106]

The original claim of the G77/China was that the common heritage of mankind principle should apply to MGRs found in the Area. This claim is based on UNGA resolution 2749 of 12 December 1970 and this position has been constantly reiterated in various arenas, from the 2004 ICP on *"New Sustainable Uses of the Oceans, including the Conservation and Management of the Biological Diversity of the Seabed in Areas beyond National Jurisdiction"*, to the 2012 BBNJ Working Group.[107]

There are only two distinct spaces to which the common heritage of mankind principle applies today: the Area itself (and unquestionably its mineral resources) and the Moon and its natural resources.[108] As a result, the regimes applicable to these two different areas do share some commonalities. In particular, a common heritage of mankind regime entails: (i) a principle of non-appropriation; (ii) the use of the common heritage for the interests of mankind as a whole (including active and equitable sharing of benefits) and (iii) a peaceful use of the designated area and its resources (Daillier *et al.*, 2008).

From these elements, certain ideas underpinning the G77/China position can be deduced. First, the common heritage of mankind principle would entail the use of the MGRs of the Area for the interests of mankind as a whole, including through the active and equitable sharing of benefits arising from their exploitation. One issue might arise from the status of MGRs found in the high seas, i.e. the water column. It would be difficult to link MGRs in the water column to the common heritage of mankind principle as that principle is widely seen as encompassing the seabed only: the texts put forward by the G77/China to justify their position such as UNGA resolution 2749 of 12 December 1970 only mention the seabed, ocean floor and subsoil thereof. But the G77/China might show flexibility on the application of the common heritage of mankind principle if an ABS regime is adopted for MGRs in ABNJ, particularly if progress is made regarding the water column. This is highlighted by the fact that the 2011 "package" did not explicitly mention the issues surrounding the application of this principle, but instead dealt with *"marine genetic resources, including questions on the sharing of benefits"*. In addition, it is not necessary for a given resource to be recognised as the common heritage of mankind so that benefit-sharing obligations triggered by its utilisation can be established, as evidenced by other relevant international treaties such as the Nagoya Protocol or the FAO International Treaty on Plant Genetic Resources for Food and Agriculture.

According to the G77/China, establishing an ABS regime for MGRs in ABNJ would not only entail the establishment of a benefit-sharing mechanism, whether monetary or non-monetary, but also the enhancement of capacity-building and the transfer of marine technology in order to facilitate access to these resources. In 2012, the G77/China underlined that *"access to genetic resources of seabed and ocean floor and the subsoil thereof […] and the exclusive exploitation by a few have serious*

105. See: http://www.iisd.ca/download/pdf/enb2570e.pdf, p. 7.

106. Although not part of the G77, Mexico has very often allied itself with this group in calling for the opening of negotiations for a new UNCLOS IA.

107. G77/China statement, BBNJ Working Group (7 May 2012): *"the common heritage of mankind principle applies to the biological resources of the area "seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction""*.

108. Article 11 of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies: *"The Moon and its natural resources are the common heritage of mankind"*. To date, only 15 States are Parties to this Treaty.

global economic and social implications".[109] They also indicated that *"the transfer of technology is an essential tool for capacity-building in the sphere of marine science. There is also an urgent need for a continued and enhanced participation of scientists from developing countries in marine scientific research in the Area"*.[110] Finally, the consideration of intellectual property rights in relation to the exploitation of MGRs, which is a rather controversial issue, has been consistently put forward by G77 countries.[111]

The second reason that may underlay the G77/China position on the application of the common heritage principle is the role of the ISA in a future UNCLOS IA. There have been proposals to link any future ABS regime to the ISA, as this organisation is already the means through which States Parties to UNCLOS manage the Area and its mineral resources. In addition, through UNCLOS, the ISA has a mandate over marine scientific research and the protection of the marine environment in the Area.[112] In its statements, the G77/China has repeatedly highlighted the importance it gives to the role of the ISA in the governance of marine biodiversity in ABNJ: *"we recognise the importance of the responsibilities entrusted to the International Seabed Authority regarding marine scientific research and the protection of the marine environment"*.[113]

But broadening the mandate of the ISA or adding to it in order to explicitly include MGRs or biological resources would raise some important questions. First, would an extended mandate only entail the biological resources or the MGRs of the Area, or would it also encompass the resources found in the high seas? If the latter option is adopted it would be difficult to obtain legal justification since it would be a departure from the traditional distinction between sedentary and other species,[114] whereas the former option would be hard to justify from a scientific point of view (for example, when considering the issue of transient genetic resources). In addition, broadening the mandate of the ISA or adding to it would probably mean that it would need to undergo significant institutional changes. For example, the Council, which is the executive organ of the ISA, has clearly been designed for managing exploration and exploitation of mineral resources only. Its members include inter alia States which are major exporters of minerals and those which have the largest investments in the Area, a situation that is clearly unsuitable for the management of MGRs.[115] Both the Council and the Legal and Technical Commission would need to be reconfigured, or more likely, new bodies established. Finally, as of today, a State must be a Party to UNCLOS to be a member of the ISA. If an UNCLOS IA seeking to ensure the widest participation possible opens - as is already the case for the UNFSA - participation to non-UNCLOS Parties, an ISA with a broader mandate will raise some difficult legal issues. From a political point of view, the participation of the US in an UNCLOS IA might also be compromised if it opposes a greater role for the ISA.

Developing countries have made less detailed statements with respect to the conservation of marine biodiversity in ABNJ and to its related tools such as multi-purpose MPAs or EIAs and SEAs. They do however mention it regularly, as it forms an integral part of the "package" adopted in 2011, and consider that this issue should be treated only in the framework of the future negotiations.[116] They have expressed their disagreement to the adoption of short-term measures related to conservation, as proposed by the EU prior to 2011.[117]

109. G77/China statement, BBNJ Working Group, 7 May 2012.

110. *Ibid*.

111. G77/China statement, BBNJ Working Group, 1 June 2011: *"we would like to reiterate, also, that the question of intellectual property rights has not been addressed by this Working Group with a view to understanding how the exploitation of genetic resources is made"* and G77 statement, BBNJ Working Group, 7 May 2012: *"The G77 and China considers that the intellectual property aspect relating to biodiversity of areas beyond national jurisdiction requires greater understanding and needs to be considered at the WG"*, both available at: http://www.g77.org/statement/.

112. UNCLOS, Articles 143 and 145.

113. G77/China statement, BBNJ Working Group, 1 June 2011 and G77/China statement, BBNJ Working Group, 7 May 2012, §10.

114. UNCLOS, Article 77.4.

115. See Article 15 of Section 3 of the Annex to the 1994 UNCLOS Implementing Agreement. On the future role of the ISA, see the presentation delivered by Duncan Currie during the IUCN-BfN seminar on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, available at: http://cmsdata.iucn.org/downloads/broadening_the_mandate_of_isa.pdf.

116. In 2011: *"all aspects of the issue: conservation, sustainable use, including the sharing of benefits derived from such use and capacity-building and the transfer of technology are all integral parts of a specific legal regime to be negotiated"* and in 2012: *"Conservation is one of the integral elements of the issue"*. See G77/China statements, BBNJ Working Group, 1 June 2011 and 7 May 2012.

117. *"The G77 and China is concerned at some suggestions aimed at adopting "practical measures" or "short-term" measures without a definition of the legal regime for the adoption of such measures"* – G77/China statement,

One area of potential disagreement between the EU and the G77/China could be the adoption of measures at the regional level to conserve marine biodiversity in ABNJ. A distinction must be made here between two types of regional bodies: RFMOs and regional seas conventions.

RFMOs are sectoral organisations dealing primarily with the management of fisheries. After the adoption of the UNFSA in 1995, some RFMOs underwent significant changes to incorporate biodiversity concerns into their functioning. Several States participating in the discussions within the BBNJ Working Group recognise that they have a role to play with respect to the impact of fishing activities on the conservation and sustainable use of marine biodiversity in ABNJ.[118] But several G77 States have expressed concerns with regard to the UNFSA and the changes it brought to RFMOs. A lot of Latin-American countries are not parties to this Agreement. In fact, *"some States […] have the view that certain provisions of the Fish Stocks Agreement amend rather than implement the LOS Convention and are therefore inconsistent with it. The provisions on compatibility and high seas enforcement by non-flag States are examples in this regard. […] Some of the coastal States that object to Article 7* (of the UNFSA) *are for similar reasons also not supportive of the notion that RFMOs are the preferred vehicles for the conservation and management of straddling and highly migratory fish stocks – as laid down in Article 8 of the Agreement – unless perhaps if coastal States are given a significant preferential status in such RFMOs. Reference can here be made to the Galapagos Agreement whose spatial scope includes high seas areas but which was negotiated exclusively by coastal States*" (Molenaar, 2010). Notwithstanding these concerns expressed at the global level, Latin-American States participate in various RFMOs across the globe. But their views in respect of their role, the way these organisations function and the rights of coastal States remain a sensitive issue.

More importantly, some of the G77 countries have expressed concerns with regard to the role played by regional seas conventions on the conservation of marine biodiversity in ABNJ. Only 4 of them currently have a mandate over ABNJ and the EU has been promoting the establishment of MPAs networks in at least two of them (the OSPAR Commission and the CCAMLR). The first OSPAR MPAs designated in 2010 have been at the heart of some controversies in the UNGA context. In 2012, for example, Argentina stated that *"regional undertakings cannot be seen as a way forward on MPAs"*.[119] It is likely that this view is consistent with the overall position that progress on conservation initiatives must proceed hand in hand with progress on MPAs. G77 countries largely recognise that a global legal basis for the establishment of MPAs in ABNJ is needed[120] because a mere regional approach would not be sufficient to endow these MPAs with the necessary legal strength and recognition. Acknowledging the existence of this gap might be a strategy towards the opening of the negotiations for a new UNCLOS IA. It might also underlie reservations regarding the regional approach to the conservation of marine biodiversity in ABNJ. If this is the case, it is likely that there will be some intensive discussions with the EU in future, which will probably be seeking, through a new agreement, the global recognition of existing MPAs and an enhanced role for the regional level.

5.3. The US: favouring a regulatory status quo at the global level

Particular attention must be paid to the US, not only because of its considerable weight in these negotiations, but also because of the very special relationship this country has with the Law of the Sea.

When UNCLOS was adopted in 1982, the US could not support its provisions on seabed-mining in the Area and on the role of the ISA. Concerns from industrialised countries over Part XI of the Convention and its approaching entry into force led to the adoption, on 28 July 1994, of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which subsequently entered into force on 28 July 1996. The 1994 Agreement, which was the first UNCLOS Implementing Agreement, addressed the issues raised by industrialised countries, notably the ones on mandatory technology transfer,[121] production policy[122]

BBNJ Working Group, 1 June 2011.

118. See for example in the 2012 IISD report of the BBNJ Working Group: *"Japan emphasised the role of RFMOs"* (available at: http://www.iisd.ca/vol25/enb2583e.html).

119. See the 2012 IISD report of the BBNJ Working Group, available at: http://www.iisd.ca/vol25/enb2583e.html/

120. *"South Africa pointed to progress at the regional level, reiterating that a possible legal basis for global action on MPAs should be part of a package including benefit-sharing. Brazil noted the need for a legal basis to provide details on the establishment and management of MPAs. Chile stressed the need for guidelines on a common methodology on MPAs"*. See the 2011 IISD report of the BBNJ Working Group available at: http://www.iisd.ca/vol25/enb2570e.html.

121. Section 5 of the Annex to the 1994 Agreement.

122. Section 6 of the Annex to the 1994 Agreement.

or decision-making,[123] with an unusual provision implicitly guaranteeing a seat to the US in the Council of the ISA.[124]

Despite this compromise, to date the US has not acceded to UNCLOS. Various US Presidents have made several attempts to gain the Senate's advice and consent, but the two-thirds majority needed at this assembly was never obtained. On the other hand, the country recognises as customary international law most of the provisions of UNCLOS and applies them.

The US non-ratification of UNCLOS is not an exception with regard to the country's international policy. For example, the US is not a Party to the CBD, a convention which has reached a quasi-universal membership with 193 Parties. The story is different with respect to fisheries: the US is a Contracting Party to the UNFSA[125] and participates in a large number of RFMOs across the globe.

The US actively participates in the work of the BBNJ Working Group, which is open to all States, as it is held under the auspices of the UNGA. From the beginning, in 2006, it was opposed to, or at least highly sceptical about, the negotiation of a new agreement on benefit-sharing for MGRs in ABNJ, whereas its position on conservation tools such as MPAs or EIAs seemed to leave a little room for manoeuvre, at least on the need for action. But all these issues are now linked through the 2011 "package".

On MGRs, the position held by the US is that the principle of freedom of the high seas contained in Part VII of UNCLOS applies and their exploitation is therefore covered by this principle. According to the US, the provisions found in Part XII of UNCLOS on marine scientific research would not be applicable to bioprospecting – the country has made here a distinction between pure and applied scientific research, stating that only pure scientific research is regulated through Part XIII, whereas commercial research, or bioprospecting is not. The US is the most important country in terms of patents associated with a gene of marine origin (Arnaud-Haond *et al.*, 2011), and has often stated that *"a new legal regime on MGRs (…) would impede research and development"*.[126] Beyond the defence of its commercial interests, the country might also be concerned that new negotiations would lead to an increased role devoted to the ISA.[127] In addition, they raise as an issue the questions of patents and, more generally, of intellectual property rights (IPRs) in the discussions on MGRs and benefit-sharing.[128] On the other hand, in trying to move discussions away from these contentious issues, the US has made several proposals related to capacity-building.[129]

The US recognises an implementation gap[130] and has made several proposals for ways in which this gap could be addressed. Inter alia, the US has:

- *"Called on the General Assembly to encourage competent bodies to collaborate to protect EBSAs and share relevant information (…)";*
- *"Encouraged progress by States and competent organisations in identifying and managing MPAs and cooperating on a case-by-case basis on potential cumulative impacts (…)".* In fact, the US has encouraged regional efforts to protect marine biodiversity in ABNJ, whether in the Southern Ocean, through the CCAMLR[131] or in the Sargasso Sea, through the Sargasso Sea Alliance.[132] This is an understandable strategy, as it is in the interest of the US to show that

123. Section 3 of the Annex to the 1994 Agreement.

124. Article 15 of Section 3 of the Annex to the 1994 Agreement guarantees a seat in the Council to *"the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product"*.

125. It is not necessary to be a Contracting Party to UNCLOS in order to become a Party to the UNFSA, as stated in Article 2 (a) of this Agreement: *""States Parties" means States which have consented to be bound by this Agreement and for which the Agreement is in force"*.

126. See the 2011 IISD report of the BBNJ Working Group.

127. *"On the work of the ISA to develop regulations for mineral resources and matters related to the biodiversity of hydrothermal vents and seamounts, the US proposed using language from previous General Assembly resolutions to avoid broadening the mandate of the ISA"*. See the 2004 IISD report of UNICPOLOS, available at: http://www.iisd.ca/vol25/enb2512e.html.

128. *"Underlining that IPR issues do not belong in the Working Group, the US stressed that patents should not be used for enforcing benefit-sharing"*. See the 2012 IISD report of the BBNJ Working Group.

129. *"The US instead urged (…) focusing discussions on MGRs on: conservation, potential criteria and guidelines for MSR* [marine scientific research], *capacity-building and training opportunities"*. See the 2011 IISD report of the BBNJ Working Group.

130. *"The idea of a new agreement also met with opposition from the US, Japan, the Republic of Korea, Norway and Iceland who contested the long and uncertain path of negotiating a new international instrument and argued that the full implementation of existing instruments will suffice to address the most pressing threats to marine biodiversity"*. See the 2006 IISD report of the BBNJ Working Group, available at: http://www.iisd.ca/vol25/enb2525e.html.

131. See for example: http://newswatch.nationalgeographic.com/2013/03/19/john-kerry-urges-support -for-ross-sea-antarctic-ocean-reserve/.

132. See the short article "Sargasso Sea in UN General Assembly Oceans resolution" at: http://www.sargassoalliance.org/highlights.

regional approaches can succeed even in the absence of an UNCLOS IA;

- *"Encouraged using EIAs to understand activities that may cause significant harmful changes to the marine environment and exchanging information about implementation of relevant UNCLOS obligations"*.[133]

Also, in 2011 the US proposed that the final recommendations of the BBNJ Working Group made reference to *"the "possible development of a new international agreement building on the framework established by UNCLOS" rather than "the possible development of an UNCLOS Implementation Agreement""*.[134] Indeed, the implicit argument was that an overly direct link between UNCLOS and a future agreement could impede the US accession to this instrument. However, precedents exist, such as the UNFSA, which was clearly established as an UNCLOS Implementing Agreement, something which did not prevent US ratification.

It is difficult to measure in advance the impacts of the US position and the extent of its flexibility on a negotiation process that has yet to start and on the content of a future agreement. Its non-participation in UNCLOS IA negotiations could have certain consequences, for example the weakening of the importance of an ABS mechanism for MGRs in ABNJ. On the other hand, it would not be politically feasible or desirable to remove the ABS component from the 2011 package to secure US participation.

5.4. The "grey area": Canada, Japan, Russia, Iceland, Norway ...

Three major blocs are represented in the discussions within the BBNJ Working Group: the EU and other conservation-minded States such as Australia and New-Zealand, the G77-China and Mexico, and the US. In between these groups are several States which are also important players in terms of maritime economy, transport or fisheries, such as Canada, Japan, Russia, Iceland, Norway, South Korea and Singapore. These States are clearly not associated with the EU or the G77 and, contrary to the US, they are all Parties to UNCLOS. Some of them explicitly refute the need for a new UNCLOS IA, whereas others are still considering the various options on the table.

In 2012, Norway indicated its willingness to consider issues such as *"the need for a possible implementing agreement under the United Nations Convention on the Law of the Sea, what a possible implementing agreement should regulate and its relationship with existing instruments and organisations, such as for example the IMO, RFMOs and regional seas conventions or other regional environmental organisations or arrangements"*.[135] This statement is interesting in that it explicitly mentions the regional instruments which may have a mandate over ABNJ. Norway is, as is Iceland, a Contracting Party to the OSPAR Convention which has already adopted several MPAs in ABNJ in the North-East Atlantic. As a result, these two States have made frequent references to the regional approach to the conservation of marine biodiversity. For example, in 2011, *"Iceland and Norway pragmatically pointed to regional bodies as the most immediate means of making progress on MPAs and EIAs"*.[136] Canada also made some references to these regional agreements: *"Canada believes that regional management bodies are in the best position to assess the unique characteristics of their surrounding ecosystems and therefore are in best position to select the most appropriate area-based management tool in accordance with the particular conditions of their local environment"*.[137] Although these countries are not firmly convinced of the need for an UNCLOS IA, they do recognise that implementation gaps exist and have made some proposals to advance on these issues through existing instruments, including at the regional level, and through the development of non legally-binding tools such as guidelines or codes of conducts.

Japan has already stated that an UNCLOS IA is not needed. It stated that *"UNCLOS Part XI (the Area) is only applicable to mineral resources in the deep-seabed; scientific research and international cooperation on MGRs in ABNJ should be encouraged; and cooperation on MPAs could be improved among regional fisheries management*

133. All quotes come from the 2011 IISD report of the BBNJ Working Group.

134. See the 2011 IISD report of the BBNJ Working Group.

135. Statement of the delegation of Norway – BBNJ Working Group – 7 May 2012.

136. See the 2011 IISD report of the BBNJ Working Group available at: http://www.iisd.ca/vol25/enb2570e.html. It is to be noted, however, that Norway and Iceland have shown some resistance to the establishment of MPAs by the OSPAR Commission in the ABNJ of the North-East Atlantic, mainly because some proposed areas were overlying areas where they had established extended continental shelves claims. In addition, these countries have a strict and narrow interpretation of the role of the OSPAR Commission, and make frequent references to the role of the North-East Atlantic Fisheries Commission (NEAFC) in the protection of marine biodiversity.

137. Statement of the delegation of Canada – BBNJ Working Group – 31 May 2011.

organisations (RFMOs), the Food and Agriculture Organisation (FAO) and the International Maritime Organisation".[138] From this statement we can ascertain that the application of the freedom of the high seas principles to the exploitation of MGRs in ABNJ and a greater role given to RFMOs on the conservation of marine biodiversity in ABNJ are essential components of the Japanese position at the BBNJ Working Group. Due to its fishing interests, Japan participates in almost all of the RFMOs that exist across the globe. In addition, it is the country with the third highest number of patents associated with genes of a marine origin (Arnaud-Haond *et al.*, 2011).

Russia has voiced its opposition to a new UNCLOS IA. Furthermore, it *"opposed the creation of new instruments"*.[139] Russia, like South Korea and Japan, has some interests in the exploitation of the resources found in ABNJ, having signed contracts with the ISA for the exploration of polymetallic nodules and sulphides in the Pacific and in the Atlantic. It is also a Contracting Party of the CCAMLR Convention and in 2012 and 2013 was one of the countries blocking the adoption of several MPA proposals in the Southern Ocean.[140]

All countries that occupy the so-called "grey area" have significant interests in one sector or another (such as fisheries, the exploitation of mineral resources or of MGRs, and international shipping), which may give them grounds for caution regarding the adoption of an UNCLOS IA. But it is important that their participation can be secured in the current negotiations, and then in the future agreement. An ABS regime without some of the key States would be less powerful and difficulties would be likely to arise in the establishment of conservation measures, since they would not be applicable to some of the vessels or nationals undertaking activities in ABNJ.

5.5. A silent majority?

A vast majority of States do not participate in the BBNJ Working Group discussions. Only 70 to 80 States are typically represented at these meetings, and among their representatives, most of the talking is done by a few. For example, the G77/China usually has one lead country which changes from year to year. It appears as if many States have remained outside of the discussions. While a good number of these countries may be landlocked, the adoption of an UNCLOS IA would nevertheless lead to benefits for them[141], particularly with MGRs, but also as many of the ecosystem services provided by ABNJ are of benefit to all countries.

In addition, some of the States that do not participate in the discussions are developing States. These states may suffer from a lack of resources which prevents them from attending the meetings. Notably, this group includes a large number of Small Island Developing States (SIDS) such as the Marshall Islands, Kiribati, Comoros, Cape Verde and Antigua and Barbuda. From a general point of view, there are large gaps in the geographical representation of States from Africa, the Caribbean Sea, the Southern shore of the Mediterranean Sea and the Pacific at the meetings of the BBNJ Working Group.

However, several States that do not participate in the BBNJ Working Group discussions do have some economic interests in these areas. This is the case for the Flags of Convenience. These States, such as Belize, Cambodia, Panama, the Marshall Islands and Vanuatu[142] run an open registry for vessels, including in some cases for vessels fishing in the high seas. The vessels registered in these States represent a significant amount of international shipping[143] and fishing.[144] A future UNCLOS IA may

138. See the 2012 IISD report of the BBNJ Working Group meeting, available at: http://www.iisd.ca/vol25/enb2583e.html.

139. *Ibid.*

140. See http://antarcticocean.org/2012/11/press-release-ccamlr-fails-on-marine-protected-areas-2/.

141. It should be noted that UNCLOS gives special consideration to these countries. Its Part X is devoted to the right of access of land-locked States to and from the sea and freedom of transit and its Article 125 (1) states that *"land-locked States shall have the right to access to and from the sea for the purpose of exercising the rights provided for in this Convention, including those related to the freedom of the high seas and the common heritage of mankind"*. Furthermore, some land-locked countries are already Member States of the ISA (for example, this is the case for Uganda, Swaziland, Slovakia, Paraguay, Mongolia and Lao People's Democratic Republic) and will benefit at a future stage from the equitable sharing of benefits deriving from activities in the Area. This precedent highlights that, because of this non-discriminatory practice, if an ABS regime for MGRs in ABNJ is established, it will include land-locked countries as well.

142. There are various lists of Flags of Convenience. Reference is often made to the one prepared by the International Transport Workers Federation: http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm. For an example of a website displaying both offers for international ship registration and for offshore company jurisdiction, see: http://www.flagsofconvenience.com/

143. According to the 2012 Review of Maritime Transport, *"almost 42 per cent of the world fleet are registered in Panama, Liberia and the Marshall Islands"*, three well-known flags of convenience (source: UNCTAD (2012), "Review of Maritime Transport 2012", *United Nations Publication*, p. 33).

144. It is difficult to give a precise estimate of the amount of fishing in the high seas carried out by vessels under

impact, in one way or another, the activities that vessels flying their flags carry out in ABNJ.

One of the challenges would therefore be to raise awareness among these various groups of States about the current discussions and their expected outcomes. The main reason for this is that the decision to open the negotiations for an UNCLOS IA could be adopted through a UNGA resolution. Such resolutions require a simple majority vote to be adopted.[145] But, as mentioned above, only around 70 or 80 States routinely participate in the discussions held in the BBNJ Working Group. There might be, for example, some discussions within developing countries gathered under the umbrella of the G77/China. Debate in this respect has previously taken place in previous meetings related to marine biodiversity in ABNJ. For example, during the Sixteenth meeting of the Subsidiary Body of the CBD on Scientific, Technical and Technological Advice (SBSTTA) in 2012, African delegates blocked the adoption of recommendations linked to the EBSAs process until the very end of the meeting, where their concerns were finally addressed.[146] However, convincing a simple majority of States to vote in favour of such resolutions is barely enough. From a political point of view, consensus is preferable, or at least a large majority.

6. MOVING FORWARD: OPENING THE NEGOTIATIONS AND CONSIDERING THE NEED FOR OTHER ACTIONS

6.1 Opening the negotiations

The political deadline set during the Rio + 20 summit to decide on the opening of the negotiations for a new UNCLOS IA before the end of the 69th session of the UNGA[147] is now only a year (since the BBNJ meetings are traditionally held in May or August) to 18 months (as the omnibus UNGA Oceans and the Law of the Sea resolution is voted on in December) ahead. Consequently, it is more crucial than ever to focus on the best way to achieve success. However, States involved in on-going discussions under the UNGA umbrella are facing a number of difficult questions with regards to the best strategy for opening (or not) the negotiations for a new UNCLOS IA:

- Should it 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?
- As the negotiations have to be opened no later than in August 2015, how can the political momentum be maintained for another 18 months?

On the first question, the two options entail two very different types of procedures. Since 2010, the BBNJ Working Group has had the mandate to make recommendations to the UNGA, which are then incorporated into the annual omnibus resolution on "Oceans and the Law of the Sea". One easy way to open the negotiations could therefore be the adoption, by States participating in the work of the BBNJ Working Group, of recommendations on the opening of the negotiations for a new UNCLOS IA. This solution, however, overlooks two issues. The first being that not all States participate in the discussions – something which could be counter-balanced by the fact that the vast majority of States usually participate in discussions on the adoption of the "Oceans and the Law of the Sea" resolution. The second issue is that recommendations of the BBNJ Working Group are adopted by consensus, making it easy for a few States (or even one) to block their adoption. The consensus rule indeed explains why, with maybe the exception of the 2011 meeting, recommendations adopted by the Working Group have very often been regarded as "disappointing" by many delegations.[148] In this context, the consensus rule seems to imply that States will only adopt recommendations that represent the lowest common denominator, i.e. that

a flag of convenience. Some flags of convenience participate in RFMOs but others do not. In addition, RFMOs do not cover all regions of the world and all species. To gain an idea of the size of the fishing fleets of some of these States, it is useful to look at the World Shipping Register. For example, as of April 2013, Honduras has 366 large-scale (≥ 24 m) fishing vessels under its flag, Panama 203, Vanuatu 79, Belize 47, St Vincent and the Grenadines 39, Mongolia 4… (source: World Shipping Register: http://www.world-ships.com/?p=).

145. Article 18 (3) of the UN Charter: *"Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting".*

146. For a report of the 16th SBSTTA meeting, see http://www.iisd.ca/vol09/enb09568e.html.

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

148. See for example the IISD briefing note on the 2010 meeting of the BBNJ Working Group, available at: http://www.iisd.ca/oceans/marinebiodiv3/: *"South Africa expressed dissatisfaction with the draft recommendations (…). Argentina stressed that like many other delegations, she did not like the draft recommendations. (…) New Zealand remarked that they expected a more ambitious outcome than the draft recommendations.(…) The EU reiterated disappointment with the formal outcome of the meeting, noting that exchanges during the week showed broader progress than what is reflected in the draft recommendations".*

everyone is willing to adopt (hence ruling out for the moment the possibility to open the negotiations for an UNCLOS IA).

A second choice would be the adoption of a stand-alone UNGA resolution to open the negotiations for an UNCLOS IA. Over the course of the history of the Law of the Sea, there has already been an incident of the adoption of this type of resolution. This occurred in 1993 when States decided to establish an intergovernmental conference on straddling fish stocks and highly migratory fish stocks.[149] This quite simple resolution could serve as inspiration for the new UNCLOS IA, especially with respect to its dispositions, which include: (i) setting up a deadline for the work of the intergovernmental conference it established; (ii) providing a clear and simple mandate to the conference; (iii) associating civil society to the process. It should be noted however that this resolution was adopted without a vote, as is the case for most of the UNGA resolutions. But things have changed since 1993 (notably with the entry into force of UNCLOS in 1994). As of today, UNGA resolutions on "Oceans and the Law of the Sea" are adopted with a vote, offering a few States with a way to manifest their opposition to some of the UNCLOS provisions by voting against them.[150] Therefore, it is possible that a vote would take place should such a resolution 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 voted in favour of it (see section 5.5). Whatever the choice, States supporting the opening of the negotiations would need to carefully weigh up the pros and cons of each option, as it seems unlikely that the chance to adopt such a resolution will come around twice.

An important point to take into account in any reform of the BBNJ Working Group would be its gaps in transparency. Usually, discussions on the final recommendations of the Working Group take place between national delegations, in the framework of the so-called "Friends of the Co-Chairs Group". Large parts of the BBNJ Working Group meetings in both 2011, 2012, and 2013 were conducted in this framework. This lack of transparency and the difficulty for observers from civil society to have open-access to information has been frequently highlighted, including by national delegations themselves.[151] It should be noted that this situation violates a large number of international commitments, including those reiterated at the Rio + 20 summit.[152]

6.2. Potential content of an UNCLOS IA[153]

On the four elements of the "package", an UNCLOS IA could help to fill a large number of gaps. In addition, the governing principles and the institutional framework, even if they are not mentioned as such in the "package", are also likely to be integrated into this would-be instrument.

6.2.1. On the governing principles

An UNCLOS IA could feature a list of governing principles, akin to those made in the UNFSA.[154] An initial draft list of these principles could include inter alia:

- The protection and preservation of the marine environment;
- International cooperation;

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

150. In this respect, according to the records kept by DOALOS, Turkey has constantly voted against these resolutions (see: http://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm).

151. See for example the statement made by the G77 on 7 May 2012, §19: *"at the last part of that paragraph, where we read "closed sessions", we would prefer to read "informal sessions". Nothing in the Rules of Procedure of the General Assembly or in Resolution 1898 (XVIII) on the recommendation of the Ad Hoc Committee on the Improvement of the Methods of Work of the General Assembly (Annex III of those Rules of Procedure) refer to the possibility of "closed sessions""*. See also the 2012 IISD report of the BBNJ Working Group: *"Argentina, supported by Brazil and opposed by Iceland, called for the draft recommendations to be developed in an open informal session with NGO participation, rather than in a closed session. The EU and Venezuela regretted the lack of NGO participation, with the EU highlighting limited transparency within the process"*, available at: http://www.iisd.ca/vol25/enb2583e.html.

152. See document A/CONF.214/L.1, The future we want, §76: *"we therefore resolve to strengthen the international framework for sustainable development which will, inter alia: […] enhance the participation and effective engagement of civil society and other relevant stakeholders in the relevant international fora and in this regard promote transparency and broad public participation and partnerships to implement sustainable development"*.

153. The conclusions of this section which are related to the potential content of an UNCLOS IA derive from the work undertaken in collaboration with IUCN and IASS during the preparation of the workshop "Oceans in the anthropocene: Advancing governance of the high seas" held on 20-21 March 2013 in Potsdam, Germany. Special thanks in this respect are due to Kristina M. Gjerde, from IUCN.

154. Article 5 of the UNFSA enumerates a list of general principles applicable to the conservation and management of straddling fish stocks and highly migratory fish stocks. Among these principles are the ecosystem and precautionary approaches and the protection of biodiversity in the marine environment.

- Science-based approach to management;
- The precautionary approach;
- The ecosystem approach;
- Sustainable and equitable use;
- Public availability of information;
- Transparent and open decision-making processes;
- Responsibility of States as stewards of the global marine environment (Freestone, 2009).

When it comes to EIAs in ABNJ, a possible way forward could be to include a "no-net biodiversity loss" principle in any future instrument and to review the outcomes of any EIA in light of this principle (Druel, 2013). A recent general study on EIAs suggested that *"the effectiveness of EIA would be bolstered if a specific aim was to deliver 'no net environmental deterioration' and if this could not be demonstrated, to require the application of the precautionary principle in decision-making"* (Jay *et al.,* 2007).

Through the UNCLOS IA, these governing principles could become core operating principles for all State parties and intergovernmental organisations, leading when needed to the reform of existing institutions.

6.2.2. On the institutional framework

At present, States already gather for a week at the BBNJ Working Group meetings in May or August, and for several weeks in September and November, in closed sessions, to negotiate the Sustainable Fisheries and Oceans and the Law of the Sea resolutions. It would not seem to represent the imposition of an undue burden to call on States to meet at a Conference of the Parties for a week to exercise overview responsibilities on the conservation of marine biodiversity. Arguably, one of the shortcomings of the UNFSA is that it did not establish a global overview institutional mechanism other than a review conference, which was held in 2006 and continued in 2010.

Such a Conference of the Parties could oversee, review and coordinate activities in ABNJ and could, for instance, review proposals for MPAs, EIAs, consider measures and make recommendations to regional bodies. If given competence over MGBRs, it could, for instance, exercise functions similar to the Conference of the Parties under the Nagoya Protocol. It would seem likely that many specific functions would in turn be devolved to regional and sectoral organisations.

In addition, through an UNCLOS IA, improvements could be made to the current system, notably through:

- A clear mandate for institutional cooperation and coordination given to competent authorities;
- Explicit requirements to reform existing institutions to ensure consistency with the principles and objectives of the UNCLOS IA;
- The development of the regional capacity to protect, conserve and sustainably use marine biodiversity in ABNJ, hence ensuring consistency between the various parts of the oceans.

6.2.3. On MPAs

An UNCLOS IA could ensure a level of consistency in the establishment and management of MPAs in ABNJ across the various regions of the globe. In particular, it could:

- Give an explicit mandate to States and international organisations to cooperate and coordinate for the establishment and management of ecologically representative and well-connected networks of MPAs;
- Give an explicit mandate to States, regional organisations and others to submit MPA proposals for international endorsement, for example by the governing body of the Implementing Agreement;
- Provide for a global default mechanism to designate MPA proposals for regions where the regional institutional framework is too weak to do so or is absent;
- Oblige States Parties to the UNCLOS IA to comply with agreed MPA management measures and not to authorise or undertake activities that might be contrary to the objectives for which an MPA was established;
- Establish a global reporting and monitoring mechanism.[155]

6.2.4. On MGRs

An UNCLOS IA could provide legal clarity and certainty regarding the regime applicable to MGRs in ABNJ. It could:

- Establish a principle of fair and equitable ABS to MGRs in ABNJ. This way, a clear legal regime would be established without entering into the seemingly unsolvable discussions related to the application of the common heritage of mankind principle;
- Establish rules for access to MGRs in ABNJ (this could involve for example the flag State or State of nationality, the ISA or a new global authority or mechanism);
- Establish a Clearing House, which could provide functions ranging from technology and capacity-building and assisting with research coordination through to providing for

155. For an idea of how an UNCLOS IA can be linked with existing instruments to establish and manage MPAs in ABNJ, see Druel *et al.,* 2011.

a mechanism to ensure traceability and access to information and even holding MGR genetic material, issuing licence agreements and distributing any financial benefits;
- Establish mechanisms for monetary and non-monetary benefit-sharing;[156]
- Provide for a link between benefit-sharing and conservation of marine biodiversity in ABNJ;[157]
- Provide for a mechanism to ensure traceability and access to information.

6.2.5. On EIAs and SEAs

Building on the existing duty contained in Article 206 of UNCLOS, an Implementing Agreement could:
- Reassert the requirement for prior assessment of all activities and provide for the requirement for the prior assessment of national and sectoral organisational plans, policies and programmes which may have an impact in ABNJ and for the assessment of cumulative impacts;
- Define the general principles or objectives that need to be taken into account in the conduct of an EIA and in the final decision on whether or not to proceed with the activity;
- Define the minimum standards that need to be fulfilled by the EIA (leaving the implementation and specific details to the existing organisations). These minimum standards would create the default mandatory mechanism needed for activities that are not currently subject to a prior EIA requirement. They would include provisions for consultations with potentially affected States, transparency and participation of stakeholders;
- Define a mechanism for global reporting and review;
- Discuss measures to be implemented to address identified adverse impacts.

6.2.6. On capacity-building and the transfer of marine technology

UNCLOS provisions on capacity-building and the transfer of marine technology[158] would benefit from a renewed look at implementation, particularly in light of the new uses and constraints to which oceans are being subjected. In an UNCLOS IA, the links between these two topics and direct conservation measures could be reinforced.

An UNCLOS IA could:
- Reiterate the need for capacity-building and the transfer of marine technology;
- Develop specific provisions to provide or facilitate access to technologies related to biodiversity conservation and MGRs;
- Address the capacity of developing countries to be able to benefit from the conservation and sustainable use of the oceans, including by developing special assistance funds for developing States or even establish a global fund for capacity-building projects;
- Establish a clearing-house mechanism for capacity-building and the transfer of marine technology, help States acquire technology and identify regional focal points.

6.3. Missed opportunities? Two issues which also need to be addressed

6.3.1. Improving the management of high seas fishing

It is not uncommon in international arenas to discuss fisheries separately from questions on the protection of marine biodiversity.[159] Fishing, as a sectoral activity, is managed at the international level through its own set of organisations: the FAO and the RFMOs. In addition, each year the UNGA adopts a dedicated resolution on sustainable fisheries,[160] whereas all other issues are addressed in the context of the omnibus resolution on "Oceans and the law of the sea". The legitimacy of this institutional disconnection could certainly be discussed at length: over time, RFMOs have proven to be slow in incorporating modern management principles such as the ecosystem or precautionary approaches and much work remains to be done (Lodge *et al.*, 2007).

In this context, the findings of the Census of Marine Life according to which *"today, fisheries, hydrocarbon and mineral extraction have the greatest impact"* on the deep-sea (Census of Marine Life, 2011) highlight the necessity to reconnect, at the policy level, fisheries and the conservation of

156. Examples of various types of monetary and non-monetary benefit-sharing are provided in the Annex to the Nagoya Protocol.

157. See for example Article 9 of the Nagoya Protocol: *"the Parties shall encourage users and providers to direct benefits arising from the utilisation of genetic resources towards the conservation of biological diversity and the sustainable use of its components".*

158. UNCLOS, Article 144.

159. This is also true at the national level: very often, fisheries and marine biodiversity are two topics which fall under the mandate of different ministries.

160. The complete title of the resolution is "Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and related instruments".

marine biodiversity in ABNJ. Originally, in 2006, discussions held in the framework of the first meeting of the BBNJ Working Group addressed fisheries issues, such as Illegal, Unreported and Unregulated (IUU) fishing or destructive fishing practices including bottom trawling. Many delegations identified these two issues as *"the greatest threats to marine biodiversity beyond areas of national jurisdiction"*.[161] In 2008, Greenpeace made a proposal for a draft "High seas Implementing Agreement for the Conservation and Management of the Marine Environment in areas beyond national jurisdiction" (Greenpeace, 2008), in which it proposed several measures directly related to fishing.[162] The same year, an IUCN study underlined that *"whether the agreement should cover fisheries activities will be a major point of dispute. (…) However, an Implementing Agreement could add value in a number of ways, including: (1) providing a regulatory regime by default for areas where there are no (functioning) RFMOs or where they are not addressing biodiversity concerns; (2) providing for harmonised mandates and rigorous performance standards across sectors and regions; and (3) providing scope for external review by the global community representing a broader range of interests"* (Gjerde *et al.*, 2008b).

Fishing slowly disappeared from the discussions held in the BBNJ Working Group context, mainly because several States indicated that, as it was already regulated in the context of the UNFSA, the FAO and the RFMOs, there would be no need to include it as a specific topic in a future UNCLOS IA.[163] Distant-water fishing nations and particularly the ones fishing in the high seas might have powerful vested interests in keeping the management of fisheries under the sole control of existing instruments. During the 2012 BBNJ Working Group, the EU made a strong statement according to which *"where activities are already regulated by existing competent authorities and legally binding instruments (e.g. RFMOs, ISA and IWC), the Implementing Agreement should not enter into direct management of these activities and any decisions regarding the management of a specific sector, such as fisheries, should be taken by the relevant competent sectoral body"*.[164] Therefore, it is very unlikely that fishing will be considered as such in any future negotiation on an UNCLOS IA. Nevertheless, discussions on EIAs, MPAs or the institutional governance framework in ABNJ will have, in one way or another, an impact on existing competent authorities and the way they currently manage fisheries in the high seas.

The high seas fishing issue underlines once more the existence of a phenomenon known as "forum shopping", to which the global oceans community is no stranger. States may make the choice of the most appropriate arena to defend their point of view, trying at the same time to avoid discussions on politically sensitive subjects, such as high seas fishing, and notably deep-sea fishing.

6.3.2. Addressing the genuine link issue

An UNCLOS IA looking to tackle the major issues raised in ABNJ would have been an opportunity to address the genuine link issue. It could have included *"clear provisions requiring States to exercise adequate control of flag vessels, their beneficial owners and their nationals (private and public)"* (Gjerde *et al.*, 2008b), such as *"a State shall authorise the use of vessels flying its flag for operations on the high seas only where it is able to exercise effectively its responsibilities in respect of*

161. Document A/61/65, Report dated 9 March 2006 of 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, §33.

162. See in particular Article 11: *"States Parties, when fishing in areas beyond national jurisdiction, shall: (a) assess the impacts of human activities and environmental factors on the marine environment, including on target stocks and species belonging to the same ecosystem of associate with or dependent upon the target stocks and the marine environment; (b) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their sustainability may become threatened; (c) minimise pollution, waste, discards, cast by lost or abandoned gear, catch of non-target species, both fish and non-fish species (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent applicable, the development and use of selective and environmentally safe fishing gear and techniques; (d) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of biological diversity; (e) take into account the interests of artisanal and subsistence fishers; (f) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as set out in Annex IV as well as information from national and international research programmes; (g) promote and conduct scientific research and develop appropriate technologies in support of conservation and management"*.

163. Views were diverging in 2006: *"some delegations noted that destructive fishing practices and illegal, unreported and unregulated fishing should be addressed in the context of the United Nations Fish Agreement, FAO instruments and regional fisheries management organisations"*, whereas *"some delegations were sceptical that existing regional fisheries management organisations had the capacity or competence to tackle relevant issues"*.

164. See EU Presidency Statement – Working Group on Marine Biodiversity – Agenda Item 4 (7 May 2012).

such vessels under the Law of the Sea Convention and this Agreement" (Greenpeace, 2008). In the absence of a political will to do so, it is likely that this issue will remain discussed only at the sectoral levels, for example within the IMO or the FAO. But failure to address the issue could substantially weaken provisions of an IA, enabling the application of responsible State measures to be avoided by reflagging into a flag of convenience State.

6.4. Other necessary actions

Until 2010, short to medium term actions related to the conservation and sustainable use of marine biodiversity in ABNJ were proposed by some delegations to the BBNJ Working Group, including the EU delegation (see section 5.1.). These proposals covered for example the adoption of an UNGA resolution on EIAs or the adoption of overarching governance principles. Since 2011 and the adoption of the "package", these types of measures are no longer discussed. This is due to concerns that they could compromise the agreement reached in 2011 between the G77/China and the EU as, through this agreement, there is now an understanding that all issues should advance at the same pace. If an UNCLOS IA is adopted in the near future, it would solve most of these outstanding issues in an even better way than non legally-binding tools such as UNGA resolutions. Questions regarding missed opportunities and lost time would only be raised if negotiations were not opened or if they failed.

At least one issue of consensus has emerged from the discussions within the BBNJ Working Group: that implementation gaps exist in the current framework. While the discussions at the UNGA level are ongoing, other competent authorities are pursuing their work within their mandates for the conservation and sustainable use of marine biodiversity in ABNJ. There are certainly merits in supporting any work undertaken by these organisations with conservation benefits. Putting aside the possibility that the negotiations may fail or may never be started, or that an UNCLOS IA may never enter into force because of a lack of ratification, it is likely that a new agreement will not replace existing instruments, and, as indicated by the EU in 2012, will not regulate that which is already regulated.[165] In addition, it could also upgrade the role of some existing instruments, such as regional seas conventions or, when they do not apply to ABNJ, encourage them to extend their mandate to include activities undertaken in these areas.

165. See EU Presidency Statement – Working Group on Marine Biodiversity – Agenda Item 4 (7 May 2012).

The attention of the international community has focused on the work undertaken under the auspices of the UNGA for several years now. Rio + 20 has reinforced this tendency with the adoption of the 2015 deadline to take a decision on the negotiations for a new UNCLOS IA. But in the meantime, the CBD is pursuing its work on the description of EBSAs, including in ABNJ, with the UNGA so far merely taking note of its results. Two regional seas conventions have engaged in the establishment of regional networks of MPAs in ABNJ and others are starting to discuss the extension of their mandate over ABNJ. The ISA is developing environmental management rules, including through the Environmental Management Plan of the Clarion-Clipperton Zone, which was adopted last year. RFMOs are still engaged in the process of identifying and protecting VMEs, whereas the IMO itself has the possibility to adopt measures aimed at protecting marine biodiversity in ABNJ from the impacts of shipping. All these measures, actions and 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 that are likely to take several years before completion. It should be pointed out, however, that an UNCLOS IA could clearly accelerate progress on all these fronts by providing mandates, principles and mechanisms for global participation and oversight. Thus, it is important to maintain a high level of ambition and pressure at the UNGA. At the same time, it is equally important to pursue progress in arenas where it is possible to do so. These two types of actions are complementary

7. CONCLUSIONS

A sense of urgency dominates the current discussions and should be taken into account when States decide whether or not they will embark on a negotiation process for a new UNCLOS IA. This "urgency argument" has already been put forward during the preparations of the Rio + 20 summit, but not all State participants could be convinced and a political compromise based on consensus could not be found on this occasion. This is therefore the second time that States will be asked to consider the question of the opening of negotiations. It is unlikely that there will be a third opportunity: political momentum will have vanished and key players may be reluctant to engage once more in discussions that have already lasted ten years.

A first step which would help improve the conservation and sustainable use of marine biodiversity in ABNJ, while at the same time securing political momentum for the negotiations and adoption

of a new UNCLOS IA, could be the adoption of a UNGA resolution on the overarching legal principles applicable to the conservation and management of marine biodiversity in ABNJ (Ardron *et al.*, 2013). In addition, this would be a good way to return to the roots of UNCLOS, which was negotiated after the adoption, in 1970, of UNGA resolution 2749 on the principles governing the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

2015 is therefore a crucial deadline. A decision will have been made and States will know what issues they should concentrate on: either pushing for the adoption and rapid entry into force of an efficient UNCLOS IA or looking at other instruments to solve the current governance problems in ABNJ. Partial solutions may be found elsewhere, as the UNGA is not the only forum having a mandate over ABNJ. This underlines once more the extreme fragmentation of the ocean governance system. There is a need to act consistently and coherently in the various international arenas in order to avoid discrepancies between the regulations developed for various States, sectors, or geographical areas. Coherence and consistence, two crucial issues when talking about areas which represent half of the planet's surface, could only be brought to the current system by the adoption of an international instrument on the conservation and sustainable use of marine biodiversity in ABNJ.

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